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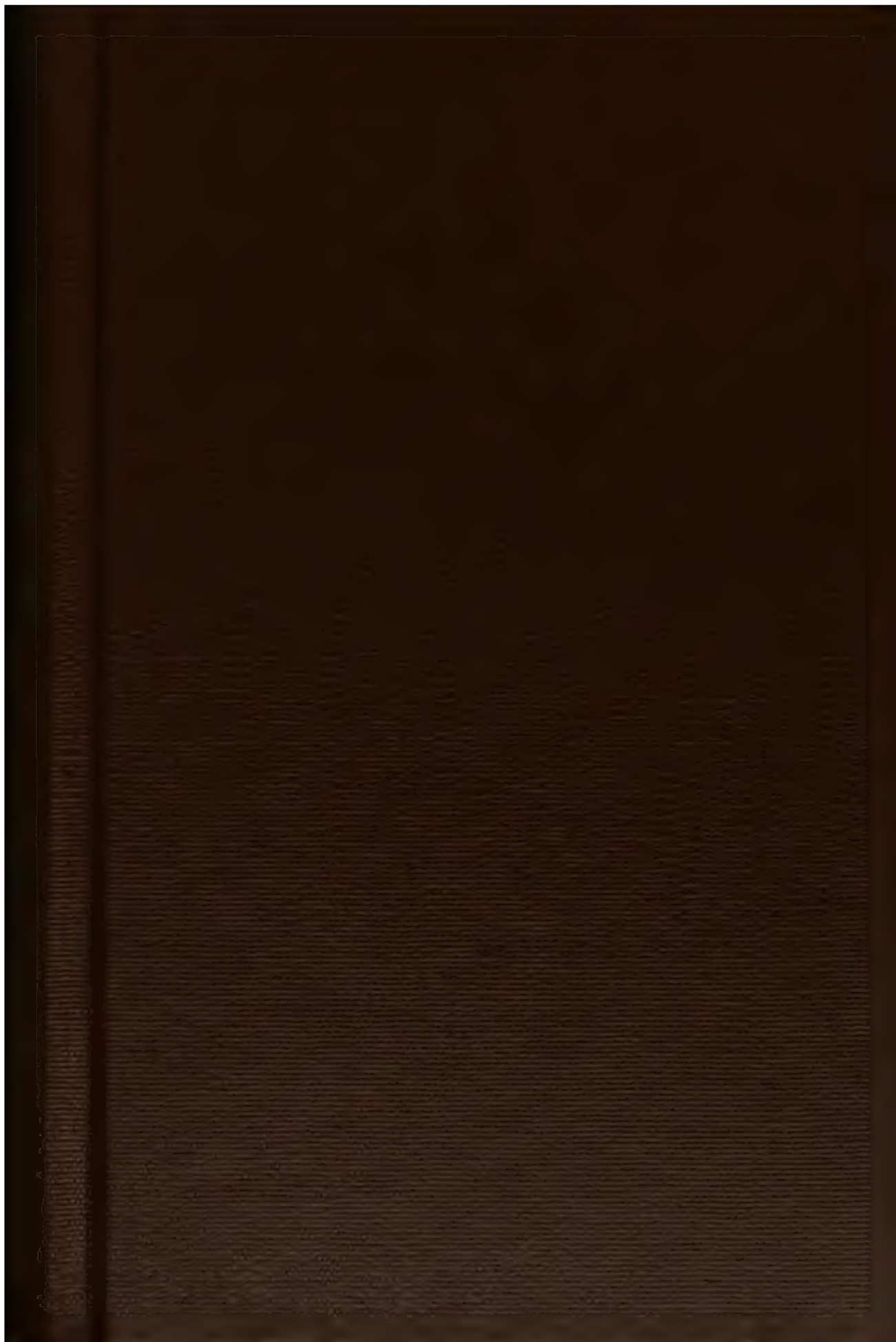
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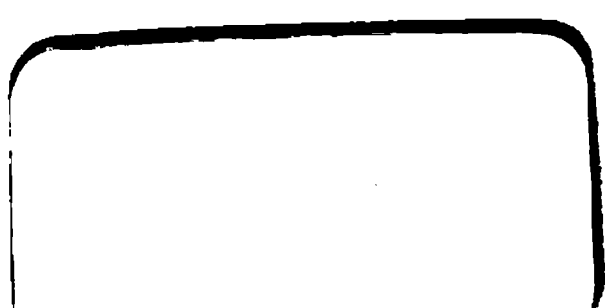
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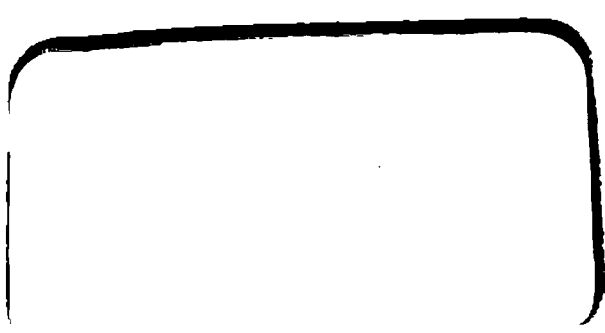
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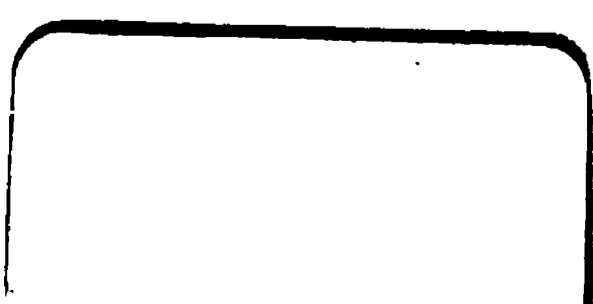




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THE
✓AMERICAN LAW
OF
LANDLORD AND TENANT

BY
JOHN N. TAYLOR

NINTH EDITION

REVISED
BY
HENRY F. BUSWELL,
AUTHOR OF THE "LAW OF INSANITY," "CIVIL LIABILITY
FOR PERSONAL INJURIES," ETC.

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PREFACE

TO

THE NINTH EDITION.

IN this edition, the text of the work has been subjected to a critical revision ; and, while every essential statement of the author has been retained, mere redundancies and verbal repetitions have been eliminated and obscurities in expression corrected. The notes, which had come in many places to outgrow the text, not only in volume but in relative importance, have been collated and condensed ; and the substance of them, when this seemed desirable, incorporated into the text. Obsolete matter, and matter clearly having no reference to the topic of the work, has been expunged. The decisions of the courts of last resort, rendered since the publication of the eighth edition, have been examined, and about twelve hundred new cases, which illustrate important principles or express the modern development of the law, are cited. While new matter, equivalent in quantity to about one hundred and fifty pages, has been incorporated into this edition, the close revision to which the work has been subject has made it

possible to avoid greatly increasing the size of the volumes.

Among the subjects more fully treated than formerly, or made the topics of original paragraphs, in this edition, are the principal Covenants of the lessor and lessee ; Surrender ; Assignment ; Forfeiture ; rights of Mortgagors and Mortgagees, under leases ; rights to Fixtures, as between Landlord and Tenant ; Mining Leases ; Railways and Receivers as lessors and lessees ; and the Equity jurisdiction, as applied to the relation of Landlord and Tenant. All new matter appearing in the text, whether in supplementary paragraphs or incorporated into the paragraphs of the original work, is enclosed in brackets. The Index has been carefully revised and necessary additions made to it.

It is the hope of the editor that Mr. Taylor's great work, which for fifty years has held its place as a leading and constantly cited authority, will, in the present edition, be found to state satisfactorily, not only the origin and history of the law of Landlord and Tenant, but also the modern development of it, as expressed in the later judicial decisions.

H. F. B.

Boston, January, 1904.

PREFACE
TO
THE EIGHTH EDITION.

IN the preparation of this edition, the later decisions have been collected and carefully collated with the text and the notes to the former editions. Such cases as merely affirm or apply legal principles already sufficiently stated in the work are cited by name in their appropriate places, while the substance of those decisions which affirm new principles, or modify or extend the application of familiar rules, will be found embodied in the notes. In all, about one thousand new cases are cited in the present edition.

In the text of the work, beyond the correction of obvious typographical errors, the only changes made are such as were rendered necessary by judicial decisions reversing or explaining former rulings, and by changes in the statute law. The index has been revised and somewhat enlarged by the addition of new headings and cross-references.

In the belief that with the increasing size of the book, occasioned by the addition of notes to the successive editions, better means of reference to the subject-matters treated in the work have become

necessary, the editor has prefixed to each paragraph of the text a brief statement of its subject-matter ; and these lines are collected into analytical Tables of Contents prefixed to each volume of the work. The editor believes that these additions will be found to increase materially the usefulness of the book.

H. F. B.

Boston, January, 1887.

PREFACE
TO
THE FIRST EDITION.

THE following attempt to reduce the Law of Landlord and Tenant to a more than ordinarily concise and systematic form will, it is hoped, meet with the indulgence of the profession for whose use it is principally designed. The learned and voluminous works of Woodfall, Chambers, Comyn, and Platt, are, to a considerable extent, useless in this country; not from any want of accuracy, fulness, or perspicuity, in their treatment of the subject, but from their failing to exhibit a satisfactory view of this branch of law, as modified by our republican institutions, and re-formed by the commercial spirit of our age. An exposition of the law on this side of the Atlantic, on a subject of such daily and hourly interest, which shall exhibit the various relations of the parties to a tenancy as understood among us, unincumbered by the useless learning of the English treatises, and adapted to our particular circumstances, has, therefore, become a matter of importance, not only to the profession, but to the entire community.

This work does not aspire to the merit of having achieved so desirable an object, but is merely intended to present a practical summary of the doctrines of the common law, — including the English cases, so far as they are applicable in the United States, with their statutory alterations and modifications, and the leading decisions in those States where legal science has been most cultivated and improved.

Some topics have been introduced which are not usually discussed in treatises on this subject, but are still intimately connected with it, and must therefore be found useful to the practitioner. Beginning with several modes of creating a tenancy, its varieties, commencement, and termination, the work proceeds to treat of the formal parts of the instrument of demise, its execution, and the capacity of the various contracting parties thereto ; explains the rights and liabilities generally incident to the relation of landlord and tenant, embracing the subjects of division-fences and party-walls, of mutual liabilities for negligence, of nuisances and easements, with rights of way, commons, fisheries, watercourses, removal of buildings, and support from neighboring soil and buildings. It then examines the special covenants and conditions which the parties usually employ for the purpose of limiting and defining their respective rights and duties ; the consequences of an assignment of the lease, as well as of the reversion ; the several modes of dissolving a tenancy, and the consequences of a dissolution, including the penalty of holding over, the

right to emblements, and the removal of fixtures; together with the legal remedies open to either party, and a selection of the most approved precedents of leases and forms of proceeding.

If, in the execution of the design, some topics have been omitted, or others not so fully discussed as, in the opinion of some persons, the subject would seem to warrant, it is to be borne in mind that the admission of everything connected incidentally, as well as directly, with the relation of landlord and tenant, would have increased the work to an extent inconsistent with the original object.

That object was to furnish a compendium, which should not only be useful to the profession in the ordinary routine of business, but of easy reference to every member of the two great classes of society whose rights and duties are the subject of inquiry. The Author will feel satisfied if, in this attempt to abridge the labors of an arduous profession, he shall in any tolerable degree have succeeded in exhibiting so accurate and concise an exposition of his subject as will be useful to practical men, whether in or out of the profession.

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THE LAW OF LANDLORD AND TENANT.

INTRODUCTION.

§ 1. THE relative position of a civil government to its citizens — that of protection on the one hand, and of dependence on the other — necessarily involves the idea of allegiance and service to the State, as a condition to the use and enjoyment of the land within its boundaries. Hence some mode of tenure is incident to every government; and the highest estate which a man can have in land has direct reference to his duty to the State, being called a tenancy in fee-simple; while the occupant is a tenant in fee, and is said to have and to hold his lands to him and his heirs. He holds of the State to which he owes fealty and service; and, if he fails in his allegiance to her, or dies without heirs upon whom this duty may devolve, the tenure is at an end, his land returns to the common stock from which he had it, and vests again in the Prince, or other representative of State sovereignty, whoever it may be; who is thence called, in common-law language, the lord paramount.

§ 2. This tenure necessarily gives rise to another legal relation, which springs up between the original tenants to the State and the various individuals among whom they find it convenient or necessary to divide their possessions, for purposes of cultivation or improvement. And this relation is necessarily modified in its character by the peculiar structure of the government under which it subsists. History teaches

that all municipal law is, in fact, but a reflection of the policy and manners of the age from which it sprung ; while the history of our law exhibits the feudal institutions of our Norman ancestors extensively incorporated throughout the whole body of modern jurisprudence, but most intimately with that portion of it which forms the subject of this Essay. It will, consequently, be found difficult, if not impossible, to form correct ideas of this particular mode of tenancy and of the various changes through which the relation of landlord and tenant has passed, from the barbarism of ancient Europe to the humanity and refinement of free America, without some previous knowledge of the history and character of the feudal ages, in which it was nurtured, if it did not originate.

§ 3. By the theory of the English law, upon which our legislation on this subject is essentially based, all property in land, since the Norman Conquest, is derived from the Crown. The King, after that event, portioned it out in large districts to the prominent men who surrounded him and who had been useful to him in war, and were capable of advising him in peace. These again subdivided their districts among their immediate followers and dependents, the actual occupants and cultivators of the soil. To all such grants, however, an express reservation of military service was annexed ; each of the principal feudatories becoming, in turn, the head of a military power, always liable to be called into action and ever ready to defend his chief. As a compensation for this service, the vassal was entitled to the use of the soil, the fee remaining in the lord ; but he was regarded rather as a bailiff or servant, accountable for the profits of, than as having any direct property in, the land. His tenure, or fief, as it was called, was of the most precarious kind, depending entirely on the pleasure of his lord, and afforded little if any encouragement to the improvement and cultivation of the land.¹

¹ The Norman period is assumed in the text, for the purpose of exhibiting the doctrine of tenures ; but there is no reason for thinking that the material parts of the feudal tenure, as exercised by the Normans, did not exist in England before their arrival. A large portion of the lands registered in the Domesday-book are stated to be held by the same tenure, at

§ 4. It soon, however, appeared to be so manifestly just that one who had sowed and cultivated the land should be allowed to reap the crop, that fiefs, which were at first so precarious, presently became annual. Having advanced to this degree of permanence, they were next granted during a term of years in favor of men who had employed their means and labor in building, planting, and improving, and who would have no inducement to do so, unless they were permitted to enjoy the fruits of their labors for a reasonable period. Then, as it would be hard to deprive a man of his possessions, who had always done his duty and performed the conditions on which he received them, chieftains soon began to consider themselves entitled to demand the enjoyment of their lands for life. Finally, it was found that a man would more willingly expose himself in battle, and devote himself more unreservedly to his lord's service, if assured that his family should inherit his possessions, and not be left in poverty by his death; whereupon fiefs became hereditary.¹

§ 5. But, although a certain degree of stability thus began to attach to these tenures, they were burdened with the most onerous incidents. No man could dispose of his lands, either by sale or by will, for ever so short a period, without the same rent, and subject to the same services, as they were in the time of Edward the Confessor; and the internal evidence of Domesday does not indicate any surrender of former tenures, or any re-grant of the same lands as feudal. The Normans probably introduced new provisions into existing tenures, and attempted more; and we know there was a contest between them and the English, whether many of those laws which had been neglected for a time should be restored or not. But the fact of their having been restored shows that no great change was allowed to prevail; and that the general system of the laws continued much the same under the new dynasty as it had been under that of the Saxons, with the exception of such usurpations as were from time to time forced upon the English. Spel. Gloss. 219; M. & S. Hist. of Boroughs, 69; Hale's Hist. Com. Law, 120. See also Co. Lit. 64, a, note; 2 Bl. Com. 48; Reeves's Hist. Eng. Law., vol. i. p. 8; Gilb. on Ten. 30; Bacon on Leases, 1.

¹ Whatever uncertainty exists as to the time when feudal tenures were first introduced into England, it is certain that terms for years were of common occurrence prior to the reign of Edward I., since the statute of 6 Edw. I., c. 11, refers to a letting for a term of years as an ordinary event.

sent of his superior. The possessor was not the proprietor, but the mere beneficiary, and could not oblige his superior to accept a vassal or occupant who was not agreeable to him. Hence arose fines for alienations, escheats, reliefs, wardships, and primer seisins.¹ Women were obliged to marry the nominee of the lord or forfeit their lands, and frequently paid large sums for the privilege of making their own choice in marriage. Justice was openly bought and sold; and the King's court was, under this detestable policy, open to none but those who brought presents. The miserable vassal was in fact, as well as in name, his lord's man. Surrendering to his lord his intelligence with his independence, his life was spent in a laborious and degraded vassalage upon the soil where he received protection and from which he derived subsistence. The tenure by which he held was *feudal*; and the whole policy of the system — which originated, probably, with the Gothic conquerors of the Roman Empire — essentially warlike, though servile in its character, was well calculated to defend by arms that which had been obtained by force. The feudal system remained in operation during the time that the laws and institutions of England were in the process of formation, and necessarily gave character to them; and although it was essentially abolished during the reign of Charles the Second, when it came to be considered as destructive of the public peace, and opposed to the progress of society;² yet

¹ Fines upon alienations are in modern times known as bonuses or gratuities, which the owner receives as the consideration of granting his permission to the transfer of a lease, restrained by a covenant against assigning.

² The military tenure of land was created originally as a means of national defence; but, in the course of ages, whatever was useful in the institution had disappeared, and nothing was left but ceremonies and grievances. A landed proprietor, who held an estate under the Crown by knight-service, and it was thus that most of the soil of England was held, had to pay a fine on coming to his property. He could not alienate without purchasing a license. When he died, if his domains descended to an infant, the sovereign was guardian, and was not only entitled to great part of the rents during the minority, but could require the ward, under heavy penalties, to marry any person of suitable rank. The chief bait which attracted a needy sycophant to the court was the hope of obtaining, as the reward of servility and flattery, a royal letter to an

the traces of its policy are still distinctly visible on both sides of the Atlantic, much of its technical language is retained, and many of its arbitrary rules yet exist.¹

§ 6. We have seen that a leading characteristic of feudal tenures had been, that the vassal took the profits, while the property of the soil remained in the lord; the lord's seignior, together with the vassal's feud, made up the whole estate. But by a series of legislative enactments, forced from the hand of unwilling power by the gradual advance of intelligence, and the resistless demands of commerce, these separate properties were at length blended into one estate; and the period arrived when the true proprietor held his lands of no superior lord to whom he owed homage, fealty, or other arbitrary service. He now had the entire right and dominion over the estate, and, subject only to the right of eminent domain, which the State never relinquishes, might alienate his land freely, and thence enjoyed an estate called *allodial*.²

heiress. These abuses had perished with the monarchy of Charles I. That they should not revive with the Restoration was the wish of every landed gentleman in the kingdom. They were therefore abolished by statute; and no relic of the ancient tenures in chivalry was suffered to remain, except those honorary services which are still, at a coronation, rendered to the person of the sovereign by some lords of manors. — Macaulay, History of England, vol. i. 144.

¹ The restraints upon alienation mentioned in the text, being of feudal origin, were predicated upon that provision of feudal law which prohibited the lord from alienating his property to such an extent as to lose the ultimate control over it. Hence, at common law, restraints upon the alienation of lands in fee could only be imposed by persons having a reversion, or at least a possibility of reversion, in them. Chancellor Kent (3 Com. 506) gives an outline of the various causes which gradually led to the mitigation of these severe restrictions, until they were finally removed (except as to the King's tenants *in capite*) by the statute of *quia emptores terrarum*. In New York, the Acts of Oct. 22, 1779, transferring the seignior of all lands, escheats, &c., from the King to the people of that State, and of Feb. 20, 1787, putting an end to feudal tenures, and substituting a tenure between each landholder and the people in their sovereign capacity, removed the foundation on which the right of the grantor to restrain alienation had formerly rested. The subject is discussed in the arguments of counsel and the opinion of the court in *De Peyster v. Michael*, 6 N. Y. 467.

² From a privative, and *lode* or *leude*, a vassal; that is, without vas-

§ 7. There had been an intermediate species of feudal tenure, called a *socage* tenure; but its incidents, although more definite and certain, were scarcely less rigorous and obnoxious than the arbitrary and uncertain tenure by knight-service. The term was applicable to freehold tenures of the Crown, and to all others, which were not military tenures, but such tenures were always deemed to be of an inferior and servile character. As intelligence increased, society advanced, commerce began to flourish, and military services became less requisite; while agricultural productions were more in demand, and the lord soon found his interest in commuting the one for the other. The substitution of a certain service, or the rendition of a stipulated sum, in place of uncertain and arbitrary, and therefore tyrannical, servitude, was a step taken towards the establishment of that freedom which the people were soon to enjoy.

§ 8. The remote and isolated position of the United States preserved, to a great extent, their independence of these embarrassing tenures; and, with a slight exception, their present condition includes no tenure but such as is incident to every free government. The law of nations has always acknowledged the right of a nation to acquire property and sovereignty over any uninhabited country which it discovers without a previous owner, if it proceeds to occupy and settle the country so discovered within a reasonable time. The question has been left unsettled, whether a nation may lawfully take possession of a country where there are none but wandering tribes, whose scanty population is incapable of occupying the whole. But it is admitted to be lawful to confine such tribes within fixed limits, whenever it becomes necessary to make use of the land of which they stand in no particular need and of which they make no actual and constant use. Thus the discovery of America conferred upon the government by which such discovery was made the ultimate dominion of the soil, with the right of granting title thereto.¹ The original settlers

salage. Land possessed by a man in his own right, and which owes no rent or service to any superior, is held in *allodium*. 2 Bl. Com. 104.

¹ Worcester v. The State of Georgia, 6 Pet. 515; Johnson v. McIn-

respected the Indian right of occupancy ; and although some of the royal patents authorized them to take possession of and colonize their chartered domains, yet, following the example of the New England Puritans, the colonists generally recognized the Indian title, and from time to time acquired by fair purchase such lands only as the Indians were willing to sell.¹

§ 9. Early colonial charters and royal grants usually contained a qualification that the land thereby granted should be held of the sovereign by a common socage tenure. But when the States succeeded to the authority of the British government, and occupied the feudal position of lord paramount, they, gradually or at once, threw off the restriction, and by legislation declared all tenure of land to be allodial. In New York, the legislature of 1778 abolished military tenures and all their incidents, retrospectively from the 30th August, 1664, when the province was surrendered by the Dutch to the English. It next abolished tenure in socage *in capite*, with its fruits and consequences ; and converted all manorial and other tenures into free and common socage ; reserving only the rents and services due upon such tenures from the persons previously entitled to them, together with the right of distress, as incident thereto. In 1779, the absolute property in all lands and tenements, and in all royalties, dues, and services which before the 9th of July, 1776, belonged or were due to the Crown of Great Britain, was declared to be vested in the people of the State. The Revised Statutes, in 1830, abolished socage tenures, with their incidents, and declared that all lands within the State should thenceforth be held upon a uniform allodial tenure, vesting the entire and absolute prop-

tosh, 8 Wheat. 543. There was no tenure of land among the savages ; no individual cultivated land for his exclusive benefit, or claimed protection in its enjoyment. It was only when civil government was established, and they were subjected to its sway, that it became necessary to define the tenure by which they, as well as all other settlers upon the lands of the State, should be thenceforth held.

¹ Vattel, book i. ch. 18, says, " We cannot help praising the moderation of the English Puritans, who first settled in New England ; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the lands they resolved to cultivate."

erty in the owners, according to their respective estates. At the same time they provided that no rents, or services certain, which had been at any time previous, or might thereafter be created or reserved, should be thereby taken away or discharged. This statutory provision, by the adoption of the Constitution of 1846, became a fundamental law of the State.

§ 10. Allodial estates have, in fact, no mark or incident of tenure attached to them, being enjoyed in absolute right; while the term *tenure* employed by the statute implies the holding of an estate from some superior, and a subjection to an ultimate dominion, which, we have seen, is abolished except so far as is necessarily implied in the duty of allegiance to the State; but the term is used in the statute in a popular sense for right or title, retaining the phraseology of English law without its significance.

§ 11. If any feudal fiction or service can be supposed to remain in any part of the United States, it consists solely in the principle that lands may be held of a person to whom the payment of a determinate rent, or certain service instead of rent, is due as to a lord paramount. But this wants the essential characteristic of a feud, since the obligation exists only by virtue of an express contract between the parties; so that fidelity to the State is now the only fealty that any man owes for his lands; his only lord paramount is the people of the State where such lands are situated.

§ 12. All private title to land within the United States is derived ultimately from grants of the State, or general government, or from royal grants which were made prior to the Revolution, and confirmed by those governments.¹ These grants to the original proprietors — of which the manor lands in New York may be cited as instances² — were frequently

¹ *Fletcher v. Peck*, 6 Cranch, 87; *Jackson v. Waters*, 12 Johns. 365.

² In New York certain purchasers, or, as they were variously called, patentees, patroons, or lords, early obtained from the British sovereigns letters patent, granting large districts in the central regions of the Col-

of great extent, and, from the inability of the proprietors to cultivate them, could have been of but little use to the owners, so long as they remained entire in their hands. Hence it became necessary to subdivide these large tracts amongst those who would undertake to cultivate and improve the land, to the advantage, not only of the proprietor, but of the public.

§ 13. The return usually made by tenants employed in the cultivation of such land was an annual contribution of corn, cattle, or other produce; or the performance of some service, either in the family of the proprietor or upon the farms which he retained in his possession. In proportion, however, as agriculture improved and money increased, it was found that these services were burdensome to the tenant, and of little advantage to the proprietor; and that the produce of a large estate could be more conveniently disposed of by the farmers who raised it, than by the landlord. A commutation was therefore made of *rents* for *services*, and of money for those in kind; and as men discovered that farms were better cultivated where the farmer enjoyed a security in his possession, the practice of granting leases for a fixed

ony. Some of these proprietors, in a spirit of emulation, obtained permission from the Crown to erect manors within these districts, with certain political, judicial, and legislative privileges and advantages, which have long since become obsolete. With reference to those advantages they adopted a system of granting lands, not absolutely in fee-simple by deed, but as qualified estates in fee-simple, by instruments commonly called leases, whereby the patroon or landlord reserved for his own use all water-power and mineral wealth. Perpetual rents were reserved; portions of which were paid in wheat and supplies for the table of the proprietor, and the residue in services or labor to be performed by the tenants about the manor-house. Alienation by the tenants was restrained, unless with the lord's consent, to be obtained by paying to him some part of the purchase-money. The right to distrain for rent — a severe but not then unusual legal remedy — was incorporated in the leases, with stringent covenants for the payment of taxes and other charges; and with various conditions securing to the landlord a right to re-enter. The validity of these leases in fee, reserving a perpetual rent, was at length definitely established, in the cases of *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Ball*, *id.* 100; *Van Rensselaer v. Barringer*, 39 N. Y. 9.

period at length generally prevailed. Such appears to have been the origin of farming leases, while in cities and towns, it is obvious, the investment of money in houses, whose rental will produce a convenient periodical income, naturally presents one of the best returns for the employment of capital. The terms and duration of possession, and the mode of enjoyment, in either case necessarily assume the shape of a contract, *express* or *implied*, which constitutes a *lease*; while the parties themselves are placed in the relation of landlord and tenant.

CHAPTER I.

THE CREATION OF A TENANCY.

§ 14. *Arises from Lease or Demise. — Rent.* — The relation of landlord and tenant subsists by virtue of a contract, express or implied, between two or more persons for the possession of lands or tenements, in consideration of a certain rent to be paid therefor. The contract itself is called a *lease* or *demise*, and is a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of *rent* to the *lessor*. The rent may consist in the payment of a certain sum of money or its equivalent at particular specified periods during the term, or in an entire sum on the complete execution of the contract. But a stated rent is not essential to the contract; because, from favor, or for a consideration passing to the lessor at the time of its inception, a lease, beneficial in its nature to the lessee, may be made without any reservation of rent.¹ [An agreement that the tenant's occupation is to be rent-free may be implied from the circumstances attending the inception of the tenancy.² And the occupant's written acknowledgment that he holds the premises as tenant does not raise a presumption of law that he promises to pay rent, the promise to pay in such a case, implied from occupation and tenancy, being an inference of fact.³]

¹ *Hunt v. Comstock*, 15 Wend. 667; *Dolittle v. Eddy*, 7 Barb. 74; *4 Cruise*, 15; *Orleans Theat. Ins. Co. v. Lafferranderie*, 12 Rob. La. 472; *Osborne v. Humphrey*, 7 Conn. 340; *Hooten v. Holt*, 139 Mass. 54; *McLennan v. Grant*, 8 Wash. 603.

² *Sherwin v. Lasher*, 9 Bradw. (Ill.) 227.

³ *Savings Bank v. Getchell*, 59 N. H. 281. The agreement implied by a demise, that the lessee shall quietly enjoy the premises, is a sufficient consideration for the lessee's agreement to pay rent. *Vernam v. Smith*,

[§ 14 *a*. **Quality of the Lessee's Estate as Real or Personal.** — Independently of the idea of a contract, a lease also possesses the property of passing an interest, and hence partakes of the nature of an estate, which, when limited to a certain period for the enjoyment of land, becomes, by the common law, a term for years; but, if it depends upon the duration of a life or lives, confers a freehold. An estate for years, however long, goes to the executor as personal assets of the testator.¹ And this was held to be the rule in the case of a lease for ninety-nine years, renewable forever, and therefore partaking of the nature of a perpetual interest, and capable of being made perpetual.² The vendor of a term of years has no lien for unpaid purchase-money after he has parted with the possession, as he might in certain jurisdictions, if it were real estate.³ Where a lessor devised the leased property to a trustee to collect the rents during the term of the lease, it was held that, after the lessor's death, the trustee might sue for arrears of rent accrued as well before as after the lessor's death, the lessor's executor assenting.⁴ In Georgia, a lease is a chattel, and an estate for years realty.⁵ In Massachusetts, under the general rule, it was held that an outstanding lease for years, as creating only a chattel interest, did not invalidate a policy of fire insurance for the lessor's benefit, in which the ownership of the assured was described as entire, unconditional, and sole.⁶ The regard which the common law showed to the tenant of a freehold, and the preference given to him above a tenant for years, depends upon feudal principles which have no

15 N. Y. 327; *Whitney v. Lewis*, 21 Wend. 131. But a promise by a tenant, holding under a lease by deed, to pay an additional sum for the use of a part of the premises, was held to be without consideration, and consequently void. *Tryon v. Mooney*, 9 Johns. 358.

¹ *Ex parte Gay*, 5 Mass. 419; *Dillingham v. Jenkins*, 15 Miss. 479; *Edwards v. Perkins*, 7 Or. 149; *Provost v. Dumfries*, 46 Ind. 172.

² *Taylor v. Taylor*, 47 Md. 295; *Mulloy v. Kyle*, 26 Neb. 313.

³ *Cade v. Brownlee*, 15 Ind. 369.

⁴ *Shillingford v. Good*, 95 Pa. St. 25.

⁵ Code, §§ 2247, 2253.

⁶ *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315, and see *Insurance Co. v. Haven*, 95 U. S. 242.

application to the conditions of modern society. And the statutes of many of the States have modified the ancient doctrine by making any interest of a lessee an estate in land, and declaring it to be subject to the lien of a judgment, and liable to taxation, and to be sold under execution, like real estate.¹ Hence ejectment lies for it,² it must also be foreclosed as realty,³ and it gives the tenant such an interest in the land as entitles him to redeem it from a prior lien.⁴ But, generally, it is held that a leasehold interest, though a chattel real, is personal estate and subject to the rules governing that species of property, except in so far as these may be modified by legislation.⁵]

§ 15. *Term.* — *Interesse termini.* — *Entry Essential.* — The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined. It is perfected only by the entry of the lessee; for, before the time fixed for entry, the whole estate remains in the lessor, and the lessee has strictly no estate in the land, but merely a right thereto which is called an *interesse termini*,⁶ an interest which, though assignable, cannot be the foundation of a release, to operate by way of enlargement, from the lessor, nor qualify the owner to maintain an action of trespass or ejectment.⁷

¹ *Trustees v. Dunn*, 22 Barb. 402, 7 Wend. 468; but see *Haz. Powder Co. v. Loomis*, 2 Disn. (Ohio) 544.

² *Ollendorf v. Cooke*, 1 Lansing, 87.

³ *Griffin v. M. Co.* Chicago, 52 Ill. 180; *Patrick v. Littell*, 36 Ohio St. 79.

⁴ *Averill v. Taylor*, 8 N. Y. 44.

⁵ *Culbreth v. Smith*, 69 Md. 450; *Autrey v. Autrey*, 94 Ga. 597; *Mulloy v. Kyle*, 26 Neb. 813.

⁶ *Williams v. Bosanquet*, 1 Brod. & B. 238; Co. Lit. 46, b; *Copeland v. Stephens*, 1 B. & A. 593, 606; *Young v. Dake*, 5 N. Y. 463. But it is otherwise where demise takes effect under the Statute of Uses. *Smith, L. & T.* 12. And where the estate of the grantor is in reversion or remainder, the termor takes an immediate estate in a reversionary term, and not an *interesse termini* merely. *Doe v. Brown*, 2 Ellis & B. 331.

⁷ *Saffyn's Case*, 5 Co. 123, b; Co. Lit. 46; 2 Bl. Com. 64, 144, 314. "A release to him before entry," says Littleton, "is void." In *Wood v. Hubbell*, 10 N. Y. 488, relief in equity was granted to one entitled to an *interesse termini*, where the premises were destroyed by fire before the term began. See *LaFarge v. Mansfield*, 31 Barb. 345.

After the period fixed for the commencement of the lease, the lessee's interest [until he enters] is still called an *interesse termini*; and although he cannot maintain trespass if not actually in possession,¹ he may maintain ejectment;² and has such an estate as may be divested by an adverse entry;³ but not be the subject of an eviction.⁴ And although this interest can neither merge nor can be surrendered because until entry the lessor's estate is not a reversion,⁵ yet the title will have passed from him to the lessee.⁶ The lessee may enter at any time, notwithstanding the death of his lessor, and after entry he becomes absolute owner of the premises for the term granted, the instrument taking effect from the time of its execution. The entry of a lessee is not, however, necessary to entitle the lessor to sue for rent, since it becomes due by virtue of the contract, and not by reason of the entry; except in the case of a [common law] tenancy at will, where rent becomes due only in consequence of the occupation.⁷ [But in the absence of a contrary provision

¹ Co. Lit. 296, b; *Wheeler v. Montefiore*, 2 Q. B. 133; *Litchfield v. Ready*, 5 Exch. 939; *Lowe v. Ross*, *id.* 553; *Harrison v. Blackburn*, 17 C. B. N. S. 678; *Brewer v. Stevens*, 13 Allen, 346, 350.

² *Gardner v. Keteltas*, 8 Hill, 332; *Trull v. Granger*, 8 N. Y. 115; *Whitney v. Allaire*, 1 N. Y. 311; *Tyler v. Heidorn*, 46 Barb. 439, 455; *Doe v. Day*, 2 Q. B. 156; *Ryan v. Clark*, 14 *id.* 65; though held otherwise in Pennsylvania; *Sennett v. Bucher*, 3 Penn. 393.

³ *Saffyn's Case*, *supra*.

⁴ *Birckhead v. Cummings*, 33 N. J. 44, 45.

⁵ *Doe v. Turner*, 5 B. & C. 111; Co. Lit. 338, a; *id.* 270, a.

⁶ *Chung Yow v. Hop Chung*, 11 Or. 220. Thus in *Ryan v. Clark*, *supra*, a tenant holding over was allowed to maintain trespass against his lessor for entry made on his premises after a demise to a third party, since the interest and legal possession, when the term is commenced immediately, and not in the future, vests in the lessee before entry. So in *L'Huissier v. Zallee*, 24 Mo. 12, the right to summary process against a first lessee who held over, vested in the second lessee. A lease of a building in course of construction, for a term of five years after its completion on or about a certain date, the dates for the beginning and ending of the lease being left unfilled, was presumed to be a lease for the term of five years dating from the completion of the building. *Noyes v. Longhead*, 9 Wash. 325.

⁷ *Bellasis v. Burbrick*, 1 Salk. 209; *Hardy v. Winter*, 38 Mo. 106. Hence lessee under a parol lease *in futuro* is liable for rent and not for

rent is not due until earned; that is, until the end of the term.^{1]}

§ 16. **Term, Assignment of. — Under-lease.** — A *term* signifies not only the limitation of time, or period granted to the lessee for the occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words “lease” and “demise” are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance. And it is essential to a lease that some reversionary interest be left in the lessor;² for if by an instrument purporting to be a demise, he parts with his whole interest in the premises, or makes a lease for a period exceeding his own term, it will, in either case, amount to an *assignment* of the term.³ But if a lessee disposes of the term granted to him, reserving any portion thereof, however small, the instrument will operate as an under-lease.⁴ And the importance of the distinction consists in this, that, while an assignee is liable to the original lessor for all the obligations of the lessee, by virtue of the privity of estate that subsists

damages only. *Becar v. Flues*, 64 N. Y. 518. But see *Caldwell v. Centre*, 80 Cal. 539, 542.

¹ *Castleman v. Duval*, 89 Md. 657.

² *Harker v. Birkbeck*, 8 Burr. 1556; 1 Black, 482.

³ *Pluch v. Digges*, 5 Bligh, n. s. 81; *Hicks v. Downing*, 1 Ld. Ray. 99. Where an instrument purported to lease and *convey*, for a fixed annual rental, for a term of years, all the coal under certain lands, it was held to be a mining-lease and not an absolute grant of the coal. *Austin v. Huntsville &c. Co.*, 72 Mo. 535. See § 17 *a, post*.

⁴ *Van Rensselaer v. Gallup*, 5 Den. 454. Thus *Piggott v. Mason*, 1 Paige, 412; *Davis v. Morris*, 86 N. Y. 569, where the last day was reserved; *Crusoe v. Bugby*, 8 Wils. 234, where three months. So where sub-lessee covenants to redeliver on the last day. *Collamer v. Kelley*, 12 Iowa, 319; *Martin v. O'Connor*, 43 Barb. 514; *Kearney v. Post*, 2, N. Y. 394. In *Linden v. Hepburn*, 3 Sandf. 668; *People v. Robertson*, 39 Barb. 9, reservation of rent and right of re-entry were held a sufficient reversion, but the latter case is maintainable on another ground, and the former is contrary to authority, 2 Preston, Conv. 124; *Doe v. Bateman*, 2 B. & A. 168, where right of re-entry, and *Wollaston v. Hakewill*, 3 Scott, N. R. 616, and *Townsend v. Read*, 15 Abb. N. C. 285, where greater rent was reserved.

between them, no action can be maintained by the lessor against an under-tenant, upon any covenant contained in the lease, since there is neither privity of estate, nor of contract between himself and the under-tenant.¹ [The effect of a demise by the lessee of his whole term is, therefore, to divest him of his reversionary rights, and render his lessee liable as assignee, to the lessor; but at the same time the relation of landlord and tenant is created between the parties to the demise if they so intended.²]

¹ In Texas the rule is statutory; Pasch. Dig. Arts, 5027, 5028. See *Gibson v. Mullican*, 58 Tex. 430; *Le Gierse v. Green*, 61 *id.* 128. The doctrine of the text seems to be established in England after considerable variance in the cases. The question has arisen between the lessee and the party to whom he has transferred his whole term by an instrument in form a demise; and the lessee has been held to have no reversion left or any right derivable therefrom, such as the right to distrain. The contrary doctrine in *Pluck v. Digges*, 2 Hud. & Br. 1, and *King v. Wilson*, 5 Mann. & R. 157, n. is overruled. *Pluck v. Digges*, 5 Bligh, n. s. 31; *Parmenter v. Webber*, 8 Taunt. 593; *Fitzgerald v. O'Connell*, 1 Jo. & Lat. 134, 156; *Hicks v. Downing*, 1 Ld. Ray. 99; *Preece v. Corrie*, 5 Bing. 24. In *Langford v. Selmes*, 3 K. & J. 220, the doctrine contended for in *King v. Wilson*, *supra*, that tenure may subsist between the lessee and his transferee without a reversion in the former, is controverted; and in *Wollaston v. Hakewill*, *supra*, such a transferee was held liable to the lessor in an action of covenant for rent, and in *Beardman v. Wilson*, L. R. 4 C. P. 57, on the covenant to repair.

² In *Poultney v. Holmes*, 1 Stra. 405, such a transfer was held to be a lease because void as an assignment. This was affirmed in *Preece v. Corrie*, 5 Bing. 24; *Baker v. Gostling*, 1 Bing. N. C. 19, where the rent reserved was held technically rent, and barred by an eviction, and in *Pollock v. Stacy*, 9 Q. B. 1033, where an action of use and occupation was held to lie. But this case is doubted in *Beardman v. Wilson*, *supra*. So, on such a demise, ejectment lies, *Doe v. Bateman*, 2 B. & A. 168; *Hogan v. Fitzgerald*, 1 Hud. & Br. 77, n.; *Walsh v. Feely*, Jones (Ir.), 413; or debt or covenant for rent, *Baker v. Gostling*, *supra*; *Ards v. Watkin*, Cro. El. 637, 651; *Williams v. Hayward*, 1 Ellis & E. 1040. In the United States the law seems to be the same, and while the right of distress is gone, *Ragsdale v. Estis*, 8 Rich. 429; *Prescott v. Deforest*, 16 Johns. 159; and the landlord may have covenant for rent against such sub-lessee, *Constantine v. Wake*, 1 Sweeny, 239; and the term returning, though by demise, to the lessor, merges, for want of a reversion, *Shepard v. Spaulding*, 4 Met. 416; *Smiley v. Van Winkle*, 6 Cal. 605; yet the lessee may create the relation of landlord and tenant without retaining a reversion, *Tyler v. Heidorn*, 46 Barb. 439; *Van Rensselaer v. Hays*, 19

§ 17. **Demisable Property, what.** — As to what property may be demised, it is a general rule that anything corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise. Therefore, not only lands and tenements, but commons, ways, watercourses, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments, are included in the common-law rule.¹ A railway company may lease its franchises and property, by authority of the legislature.² So personal chattels may be demised; and, although rent cannot be said, technically, to issue out of them, the contract for its payment is valid, and an action for rent in arrear may be maintained upon such leases; while the lessee is liable at the end of the term for the non-delivery of the articles themselves, or their value, as any other bailee.³ But the attempt of the tenant to sell

N. Y. 68; *Same v. Read*, 26 *id.* 576; may have ejectment, *Same v. Slingerland*, *id.* 580; *Tyler v. Heidorn*, *supra*; covenant or debt for rent, *Patten v. Deshon*, 1 Gray, 325; *Demarest v. Willard*, 8 Cow. 206; *Willard v. Tillman*, 2 Hill, 274; *Wallace v. Harmstad*, 41 Pa. St. 492; or summary process, *Shumway v. Collins*, 6 Gray, 227; *Blumenberg v. Myers*, 32 Cal. 93; *Den v. Post*, 1 Dutch. 285, where a covenant not to underlet was held to include an under-lease for the whole term. In Wisconsin, by R. S. § 2189, it is provided that an action for rent may be maintained by the lessor against any party who has entered under the lessee and is found in possession. See *Wittman v. Milwaukee, &c. Railway Co.*, 51 Wis. 89.

¹ *Shep. Touch.* 268; *Bac. Abr. Leases (A)*; *Commonwealth v. Weatherhead*, 110 Mass. 175; *Eastham v. Anderson*, 119 *id.* 526; *Morrill v. Mackman*, 24 Mich. 279; *Comm'rs v. Clark*, 33 N. Y. 251; *Taylor v. Beebee*, 3 Rob. N. Y. 262. Turpentine trees are the subject of a lease. *Rooks v. Moore*, Busb. N. C. 1. So growing timber, grass, &c. *Freeman v. Underwood*, 66 Me. 229. The right to cut and remove ice may be leased by the owners of the bank adjoining the stream on which it forms. *Lorman v. Benson*, 8 Mich. 18; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.*, 102 Mich. 227; *Oliver v. Olmstead*, 112 Mich. 483.

² *Black v. Del. & Rar. Canal Co.*, 7 C. E. Green, 130; *Troy & Rutland R. R. Co. v. Kerr*, 17 Barb. 601; *Commonwealth v. Smith*, 10 Allen, 455; *Lehigh Zinc & Coal Co. v. Bamford*, 150 U. S. 287. If a railroad is leased to one who assumes the duty of repairing it, the owners still remain liable to persons injured by the defective condition of the road. *Hamden v. New Haven & Northampton Co.*, 27 Conn. 164. See § 126 *a, post*.

³ *Zule v. Zule*, 24 Wend. 76. But in *Fay v. Holloran*, 35 Barb. 295, the technical rule was applied, and on lessor's decease no apportionment

any of them determines the tenancy as to such articles, and the general owner may sue either the tenant who sold the property, or the purchaser in trover, for a return of the things themselves.¹ [If the object of the demise is special, as to bore wells for salt, and the lessee brings oil to the surface, it belongs to the owner of the soil. The lessee is not bound in such case to collect the oil for the owner, he may let it run to waste; but if he does collect it, and appropriates it to his own use, he must account for it to the owner.²]

[§ 17 *a*. **Mining Leases. — Coal, Oil, and Gas.** — Leases for the mining of metals, coal, oil, and gas, differ in essential particulars from leases of land. In mining leases, the title is inchoate, and for purposes for exploration only until the oil or mineral is found. If the mineral, the subject-matter of the lease, is not found, no estate, ordinarily, vests in the lessee; and his title may be determined when the unsuccessful search, made in good faith, is abandoned. If the mineral is found, then the lessee's right to mine for it becomes vested, and he will be protected therein as by the terms and conditions of his lease.³ The lease in such a case is held to be

of rent was allowed for stock, parcel of the demise, because rent issues only from land. So in *Sutliff v. Atwood*, 15 Ohio, N. S. 186, the assignee of a lease of lands and stock was held liable for the whole rent, though he did not get the stock. *Spencer's Case*, 5 Co. 16, 3d resolution; *Newman v. Anderton*, 5 B. & P. 224; *Farewell v. Dickinson*, 6 B. & C. 251; *Salmon v. Matthews*, 8 M. & W. 827; *Morris v. Tillson*, 81 Ill. 607; *Armstrong v. Cummings*, 20 Hun, 313. The contrary doctrine was held in *Mickle v. Miles*, 31 Pa. St. 20; and rent from chattels held distrainable. So in *Newton v. Wilson*, 3 Hen. & M. 470, rent from chattels, parcel of the demise, was held apportionable; and as no eviction can take place from a part of demise from which no rent flows, *post*, § 385, it would be absurd to say that on a demise of a farm valuable only for the stock, or of a shop for its machinery, the lessor might take the stock or machinery, and the lessee still be held for the rent.

¹ *Swift v. Mosely*, 10 Vt. 208; 28 *id.* 1; *Farrant v. Thompson*, 5 B. & A. 826; *Billings v. Tucker*, 6 Gray, 368.

² *Petersen v. Kier*, 2 Pittsb. Pa. 191. The sale of a leasehold interest is to be construed strictly, and a written contract selling a "lease" does not carry with it oil that had theretofore been pumped from oil wells on the leased premises. *McGuire v. Wright*, 18 W. Va. 507.

³ *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 287; *Foster v. Elk*

not a grant of property in the oil or other mineral to be mined, but merely a grant of possession for the purposes of searching and mining.¹ But the mineral being once mined, the title thereto becomes vested in the lessee, subject to the provisions of his lease.² The mining estate is servient to the surface estate and the lessee takes the lease with an implied covenant so to conduct his mining operations as not to damage the surface or dominant estate by undermining or otherwise.³ Thus a mining lease partakes of the nature of an irrevocable, exclusive license.⁴ If, upon diligent explo-

Fork Oil & Gas Co., 61 U. S. App. 576, and see *Cowen v. Radford Iron Co.*, 83 Va. 547; *Petroleum Co. v. Coal, Coke, & M'fg. Co.*, 5 Pickle (Tenn.), 381; *Calhoon v. Neely*, 201 Pa. St. 96; *Gartside v. Outley*, 58 Ill. 211; *Steelsmith v. Gartlan*, 45 W. Va. 27; *Carter v. Tyler County Court*, 45 W. Va. 806. See §§ 20 n., 131 n., 229 n. A lessee of mining ground in possession who ousts his lessor by relocating the ground and setting up an adverse title forfeits all rights under the lease. *Silver City Mining Co. v. Lowry*, 19 Utah, 335. And the lessee in a mining lease is estopped to deny the lessor's right to the ground covered by the lease because the only discovery of mineral thereon was a place substantially the discovery point of another and subsisting claim. *Mining Co. v. Pascoe*, 24 *id.* 60.

¹ *Barnhart v. Lockwood*, 152 Pa. St. 82.

² *Trees v. Eclipse Oil Co.*, 47 W. Va. 107; *Lawson v. Kirchner*, 50 *id.* 344. An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry. Such lease is terminated by the death of the lessor. *Trees v. Eclipse Oil Co.*, *supra*.

³ *Jones v. Wagner*, 66 Pa. St. 429; *Horner v. Watson*, 79 Pa. St. 242; *Coleman v. Chadwick*, 80 Pa. St. 81; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Mickle & Co. v. Douglas*, 75 Iowa, 78; but see *Hodgson v. Perkins*, 84 Va. 706.

⁴ *Stinson v. Hardy*, 27 Or. 584. It is said that, owing to the vagrant character of oil and gas, a lease of these substances partakes of the character of a lease for general tillage rather than that of a lease for mining or quarrying the solid minerals. *Wettengel v. Gormley*, 160 Pa. 559. And it is held that an agreement by a mining company, in the form of a lease for one year, giving to the lessee one half of the gross proceeds of the mine as a return for working the same and bearing all expenses, except necessary improvements, which are to be furnished by the lessor, does not create the relation of landlord and tenant, but is an agreement for working the mine on shares; so that the parties become tenants in

ration, no mineral is to be found upon the leased premises the lease fails, and the lessee cannot be held liable for the royalty agreed to be paid on such mineral as should be mined on the premises during the term of the lease;¹ and it seems that the lessee in such case will be justified in abandoning, and that such abandonment will operate, at law, and may be treated by the lessor, as a surrender of the lease.² This may be otherwise if the lessor encourages further operations and expenditures in operations under the lease, on the basis of its continuance.³ If the lease is for a specified term of years, and so much longer as oil or gas is produced in paying quantities, it expires at the end of the specified term, unless, within that time, the oil or gas is produced in paying quantities.⁴ It is considered that oil, and the same is true of all minerals, while it remains in the land is a part of the realty, and so the property of the lessor, until it is brought to the surface, when it becomes the personal property of the lessee.⁵ In mining leases there is the ordinary implied covenant of right of entry and quiet enjoyment for the purposes of the lease.⁶ The lessee, in the absence of any provisions to the contrary, is under an implied obligation to begin mining

common of the products of the mine when taken out. *Hudepohl v. Liberty Hill Consolidated Mining & Water Co.*, 80 Cal. 553. A verbal contract between the owner of a mine and a third person, whereby the latter is given permission to enter and work the mine if he sees fit, and to exercise his own discretion whether to work it or not, does not create the relation of landlord and tenant between the parties, but is a mere license. *Wheeler v. West*, 71 *id.* 126. And so a conveyance for mining purposes for no determinate period, but until the mineral shall be exhausted, is held to be no more than a license. *Hobart v. Murray*, 54 Mo. App. 249.

¹ *Gibbon v. Atkinson*, 64 Mich. 651.

² *Worrall v. Wilson*, 101 Iowa, 475; *Cowan v. Radford Iron Co.*, 83 Va. 547.

³ *Riddle v. Mellon*, 147 Pa. St. 30.

⁴ *Gas Co. v. Tiffin*, 59 Ohio St. 420. See *Brown v. Fowler*, 65 Ohio St. 507.

⁵ *Wilson v. Youst*, 43 W. Va. 826; *Carter v. Tyler County Court*, 45 W. Va. 806; *Venture Oil Co. v. Fretts*, 152 Pa. St. 451; *Plummer v. Coal & Oil Co.*, 160 *id.* 483.

⁶ *Knotts v. McGregor*, 47 W. Va. 566.

within a reasonable time;¹ and, in an oil lease, to drill and operate such number of oil wells on the lands as may be necessary for the production of the oil contained in such lands.² The lessee's covenant to use "ordinary precautions" in mining coal intends the furnishing of a proper support to the overlying surface.³ Forfeitures of mining leases are not favored. It is said that the right to forfeit estates cannot exist by reason of the existence or non-existence of a state of facts not clearly defined; thus a condition "to use all economy in the conduct and management of said mining enterprise" is too uncertain to be a ground on which a forfeiture may rest.⁴ The mere failure to pay royalties reserved, when due, will not of itself work a forfeiture unless the lease expressly so provides;⁵ and equity may excuse the default in payment when it would be inequitable to do otherwise;⁶ as where a great loss, disproportionate to the injury caused by the default, would otherwise result to a lessee negligently, but not fraudulently, in default.⁷ It is held, upon the lessee's failure to drill a well or instead thereof to pay rental, that such rental may be recovered by action as such, and need not be sued for as unliquidated damages;⁸ but,

¹ *Island Coal Co. v. Combs*, 152 Ind. 379.

² *Harris v. Ohio Oil Co.*, 57 Ohio St. 118.

³ *Robertson v. Youghiogheny River Coal Co.*, 172 Pa. St. 566; *Carlin v. Chappel*, 101 Pa. St. 348; *Youghiogheny River Coal Co. v. Hopkins*, 198 Pa. St. 343. The covenants to explore for oil, to work the wells, and to pay royalties, in a coal lease, run with the land. *Bradford Oil Co. v. Blair*, 113 Pa. St. 83; *Williams v. Short*, 155 *id.* 480. See § 261, *post*.

⁴ *Benevides v. Hunt*, 79 Tex. 383. See §§ 497-499, *post*.

⁵ *Wakefield v. Sunday Lake Mining Co.*, 85 Mich. 605; and see *White v. Lee*, 5 B. & A. 572; *Cheney v. Bonnell*, 58 Ill. 268.

⁶ *Edwards v. Gas Co.*, 65 Kan. 362.

⁷ *South Penn. Oil Co. v. Edgell*, 48 W. Va. 348.

⁸ *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161. The measure of damages is the value of the occupancy of the land for the purpose designated in the lease. *Schneider v. Patterson*, 38 Neb. 680. See *Hadley v. Baxendale*, 9 Exch. 341. It was held incumbent on the lessor to show that the coal could be mined at a profit. *Colo. Fuel & Iron Co. v. Pryor*, 25 Col. 540. Where a lease of land for oil mining purposes, with the exclusive right of boring for oil thereon, restricts the operations to certain sites, and the lessor or his subsequent grantee drills wells on the leasehold outside of the sites designated, the lessee's measure of damages

ordinarily, the lessor's remedy for the failure of the lessee to develop the leased premises, or perform other acts according to his covenants, would seem to be by an action at law for damages; although where fraud has been practised on the lessee equity may interpose for his relief.¹ It is held that equity may rescind a lease made under mutual mistake as to the existence of minerals in the land.²]

§ 18. **Personal Chattels upon the Land, how demisable.** — It is frequently convenient to include in the contract of lease the live-stock and farming implements upon land, or the furniture and other chattels in a house, and so these have, to a certain degree, acquired demisable qualities; although the interest which passes to a lessee of such things is very different from that which is transferred by a lease of real property. The lessee has the use of them during the term, and may be restrained from destroying, selling, or giving them away; but the lessor's reversionary interest is of so precarious a nature as to be accounted in law a mere possibility [and he can maintain neither trespass nor trover for them, pending the lease.³] No lease or grant can be made of them, during or after a term in possession, until the lessee has redelivered them. In case of a lease of live-stock, the absolute property of such as die vests in the lessee; as also do the calves, lambs, or other produce of such stock, which are considered to be profits, severed from the principal object of demise in compensation for the rent paid by the lessee.⁴ It is usual in such leases to annex a schedule of the several articles proposed to be included in the demise, and to insert

is the difference in value of the leasehold before and after the injury was committed. *Duffield v. Rosenzweig*, 150 Pa. St. 543.

¹ *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 247, where the question is elaborately discussed.

² *Bluestone Coal Co. v. Bell*, 38 W. Va. 297.

³ *Trisany v. Orr*, 49 Cal. 612.

⁴ A lease of a farm, with the cows and sheep thereon, contained a provision that cows and sheep of equal age and quality should be returned at the expiration of the lease. Held that, during the continuance of the lease, the cattle belonged to the lessee, and might be taken on execution for his debts. *Carpenter v. Griffin*, 9 Paige, 310.

a covenant upon the part of the lessee, to redeliver them at the end of the term; and without such covenant the lessor is said to have no other remedy at law but trover or detinue for them, after the lease is ended.¹ [An agreement by the lessor to convey chattels, included in the lease, to the lessee, at the end of the term, upon due performance of the lessee's covenants, is a conditional sale, and the title to the chattels remains in the lessor until the end of the term.²]

SECTION I.

A TENANCY BY IMPLICATION.

§ 19. **When implied; generally; Third Persons entering.** — The relation of landlord and tenant may be created by implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other; for in such cases it will be presumed that the occupant intended to pay for the use of the premises.³ It will be implied, in many cases, where there has been no distinct agreement between the parties, or where, from various causes, the agreement may have ceased to be operative.

¹ *Putnam v. Wyley*, 8 Johns. 432; *Newton v. Wilson*, 3 Hen. & M. 470; Co. Lit. 57, a; *Spencer's case*, 5 Co. 16, b; *Billings v. Tucker*, 6 Gray, 368. Where cattle were leased for a term of years, to be taken back by the owner within the term if he should think them unsafe in the hands of the lessee, held that the lessor could not reclaim them until after fair notice given. *Wyman v. Dorr*, 3 Me. 183.

² *Bean v. Edge*, 84 N. Y. 510.

³ It is held that the presumption thus created is not a presumption of law. *Savings Bank v. Getchell*, 59 N. H. 281. But it is also held that one entering into possession with full notice of the rent demanded is under contract obligation to pay such rent although he refuses to do so, or declares that he will pay only under protest. *Thompson v. Sanborn*, 52 Mich. 141. The payment and receipt of rent are the strongest evidence to establish the existence of a tenancy. *Doe v. Jefferson*, 5 Houst. 477. A mother's occupation of her son's house is presumed to be on condition that she shall pay rent. *Harlan v. Emery*, 46 Iowa, 538; and see *Doe v. Jefferson*, *supra*. One who is in as servant of the owner, but is permitted by the owner to sublet to another, becomes thereafter a tenant and not a servant. *Snedaker v. Powell*, 32 Kan. 396.

Thus, the permissive occupation of premises previous to or pending the execution of a lease, or the payment of rent under an invalid agreement, are circumstances from which this relation will be implied, sufficient to authorize the collection of subsequently accruing rent.¹ And, if a man enters upon land under a void lease, he cannot be treated as a disseisor, but becomes a tenant at will, and can only be removed after notice.² So the taking of the key of a house, for the purpose of occupying it, but without going into actual occupation, has been held to imply a tenancy.³ The relation is also created by statute between a grantee of the reversion, and the lessee of the grantor, of premises which are under lease at the time of the conveyance;⁴ and is held to exist as between the grantor and grantee of a conveyance in fee, which reserves rent, and applies to each subsequent assignee of the land so conveyed.⁵ And, as a general rule, it may be stated that the mere occupation of land, with the owner's concurrence, will enure as a tenancy from year to year, or at will, according to circumstances, determinable at the pleasure of the owner.⁶ [But a tenancy does not exist as

¹ *Hammerton v. Stead*, 3 B. & C. 478; *Dunne v. Trustees*, 39 Ill. 578; *Pinero v. Judson*, 6 Bing. 206; *Anderson v. Midland R. R.*, 30 L. J. Q. B. 94; *Larned v. Hudson*, 60 N. Y. 102; *Gustin v. Burnham*, 34 Mich. 50; *Butler v. Bertrand*, 97 *id.* 59; *Tuttle v. Langley*, 68 N. H. 464. But where the occupation is without the owner's consent, no tenancy arises. *Ackerman v. Lyman*, 20 Wisc. 454. A notice to quit is a recognition of an existing tenancy. *Doe v. Miller*, 2 C. & P. 348. An occupant is one who has the actual use or possession of a thing; and occupancy implies the exclusion of every one else from enjoyment. *Redfield v. Utica & Sy. R. R.*, 25 Barb. 54. Thus in the case of mutual depasturing of land by the parties, there is no tenancy implied between them, it being a case of mutual licenses granted by each to the other. *Stone v. Wait*, 50 Vt. 663.

² *Digby v. Atkinson*, 4 Camp. 275; *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 83.

³ *Little v. Martin*, 3 Wend. 219.

⁴ *Funk v. Kincaid*, 5 Md. 404; and see §§ 180, *a*, 295, 441, *post*.

⁵ *Van Rensselaer v. Smith*, 27 Barb. 104; *Same v. Hays*, 19 N. Y. 68; §§ 50, 295, *post*.

⁶ *Boudette v. Pierce*, 50 Vt. 212; *Vetter's Appeal*, 99 Pa. St. 52; *Marvel v. Ortlip*, 3 Del. Ch. 9; *Cressler v. Cressler*, 80 Ind. 366; *Oxford v. Ford*, 67 Ga. 862; *Towery v. Henderson*, 60 Tex. 291; *Hulett v. Nugent*, 71 Mo. 132; *Ellsworth v. Hale*, 33 Ark. 633.

between the owner of land and one who, at his invitation, and without any agreement as to rent, has occupied it,¹ or where the occupant is put in possession for the benefit of the owner, and retains possession till notified to quit,² or when the contract to convey land permits the purchaser to enter and occupy, and he does this, and makes payments prescribed by the contract.³ The occupancy of premises by an employee for the purpose of enabling him the better to perform the service of his employer, there being no letting in terms and no rent reserved, does not create the relation of landlord and tenant between the parties, but the possession will be that of the employer. But the employee may become a tenant at sufferance by holding over after the termination of his employment.⁴ Generally, however, any person entering into demisable premises by the consent or connivance of the tenant becomes a tenant, at the option of the landlord.⁵ If he enters into possession of vacant premises which have been previously demised with the consent of the tenant, he will be considered, in respect to the landlord's rights, to have been substituted in place of the tenant, although he may disclaim privity with the landlord.⁶]

§ 20. *Implied from Special Circumstances.*—The intention to create a tenancy may be inferred from a variety of cir-

¹ *Strickland v. Hudson*, 55 Miss. 235.

² *Middleton's Ex'rs v. Middleton*, 85 N. J. Eq. 141.

³ *Ankeny v. Clark*, 148 U. S. 345.

⁴ *School Dist. No. 11 v. Batsche*, 106 Mich. 330. There is no implied promise on the part of a judgment debtor, whose land has been sold under execution, to hold as tenant of the purchaser. *Tucker v. Byers*, 57 Ark. 215.

⁵ *Benson v. Bolles*, 8 Wend. 175; *Jackson v. Miller*, 6 Wend. 228; *Graves v. Porter*, 11 Barb. 592; *Hall v. West. Trans. Co.*, 35 N. Y. 284.

⁶ *Bacon v. Brown*, 9 Conn. 358; *Howard v. Ellis*, 4 Sandf. 369. But see *Jackson v. Mowry*, 30 Ga. 14; *Moore v. Calvert*, 6 Bush, 356. Where a tenant for years made a conveyance in fee, of the premises, under which the grantee entered, the latter was held to be in as assignee of the tenant, *Jackson v. Davis*, 5 Cow. 123; for a deed conveys only the interest of the grantor. 1 N. Y. R. S. 739, § 148; *Doe v. Brown*, 8 East, 165. An action for use and occupation of premises may arise from the mere waiver of a tort, or the simple letting into possession. *Church v. Imp. Gas Light Co.*, 6 Ad. & E. 854.

cumstances; as where lands having descended to an infant, with respect to whom the tenant in possession was a trespasser, and an action of ejectment being brought and compromised upon terms, one of which was that the tenant should attorn to the infant, a tenancy was held to have been thereby created, although the infant had not assented to it, nor received rent since he came of age.¹ And a similar result was said to follow where a *feme covert* lived separate from her husband, and received to her separate use the rents of certain lands which came to her by devise, after separation; for it was presumed that she received such rents by her husband's authority, and, accordingly, that he could not maintain ejectment, at least before giving notice to quit to the tenant.² So where the owner of a house agreed that his creditor might occupy it for a year, and until he paid a mortgage held by the creditor; and also where a man entered under an agreement to accept a lease for a certain period, at a specified rent, but subsequently refused to accept it; in each case the relation of landlord and tenant was held to exist.³ [Generally, one who enters under an occupancy apparently permitted by the landlord may claim to be treated as tenant.⁴ An instrument conveying premises to the grantee for the purpose of mining coal so long as there is coal to mine thereon, with provisions for bank rents, and forfeiture for non-compliance with its terms, was held to be a lease, and not a contract in the nature of a servitude.⁵ In Texas, an owner of grazing land who stocks his land with

¹ Doe v. Noden, 2 Esp. 580.

² Doe v. Biggs, 1 Taunt. 867. A parol demise from one of three joint grantees to his co-grantees was held to be implied from the facts that he paid none of the purchase-money, claimed no title and exercised no control over the premises for forty years. Webster v. Holland, 58 Me. 168.

³ Hunt v. Comstock, 15 Wend. 665; Anderson v. Prindle, 23 id. 616; Cox v. Bent, 2 M. & P. 281; 5 Bing. 585.

⁴ Maquart v. Lafarge, 5 Duer, 559.

⁵ Gartside v. Outley, 58 Ill. 211. Where a lease provided for a payment of royalty on ores to the amount of \$1000 per year; and that if sufficient ores were not found to pay such royalty, there the deficiency should be made up in cash, it was held that the lease created a rental of \$1000 per year. Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 287. See § 17, *a, ante*.

cattle greatly in excess of the number that can be fed upon it, and permits them to go upon and occupy and feed from the grass growing upon the unoccupied land of a neighboring proprietor, with no separating fence, becomes liable to the proprietor for the rental value of his land so occupied.¹ Where one goes into possession of land under an oral agreement by which the owner is to erect a house thereon and devise the land to him, he in the meantime to pay rent for the premises, the relation of landlord and tenant exists.² Where the vendor's title was good, but exception was taken to the form of the deed, and the purchase-money was not tendered, and no conveyance was consummated until some months later, the vendee was held bound to pay the stipulated rent until such time as the conveyance was consummated.³ The tenancy at will initiated between a vendor and vendee by the failure of the latter to carry out the contract of sale may be terminated by a tender of compliance therewith by the vendor, coupled with the ability to make good the tender.⁴]

§ 21. **No Implication for Mere Occupancy.** — But the mere occupancy of property does not necessarily imply the relation of landlord and tenant, for if no rent has been paid and no concurrent act of the parties, or other circumstance, exists, from which consent to a tenancy on the part of the owner may be inferred; and if the consent was conditional and was afterward forfeited, a tenancy cannot arise from the mere occupation.⁵ And if a man gets possession of a house without the privity of the owner, although the parties may after-

¹ *Lazarus v. Phelps*, 152 U. S. 81.

² *Hopkins v. Ratcliff*, 115 Ind. 213.

³ *Flynn v. Whitebreast Coal & Mining Co.*, 72 Iowa, 738.

⁴ *Sievers v. Brown*, 34 Or. 454.

⁵ *Rich v. Bolton*, 46 Vt. 84; *Edmonson v. Kibe*, 43 Mo. 146; *Jordon v. Mead*, 19 La. Ann. 101; *Cook v. Norton*, 48 Ill. 20; *Williams v. Deriar*, 31 Mo. 13; *Leonard v. Kingman*, 136 Mass. 123. The use of the unimproved bank of a river, in mooring rafts, does not create this relation between the riparian owner and the proprietor of the rafts, *Hall v. Jacobs*, 7 Bush, 595; and there can be no recovery for use and occupation. *Stewart v. Finch*, 2 Vroom, 17. But a person so holding is not a trespasser until demand and refusal. *Carson v. Baker*, 4 Dev. 220.

wards enter into a negotiation for a lease, which negotiation goes off; or if, after being let into possession, under an agreement to sign a written lease, and find surety for the rent, he does neither; no tenancy is created, but the occupant, in either case, becomes a mere trespasser.¹ [The relation of landlord and tenant can arise only where he who is in possession has, by some act or agreement, recognized the other as his landlord, and taken upon himself the character of a tenant under him, so that he is not at liberty afterwards to dispute his title.² So a second lessee of premises, pending a first lease, was held not a tenant of the first lessee by mere notice from him.³ One who had received a license from a *cestui que trust* authorized to lease, but had paid no rent, was held liable to be ejected by the trustees without notice or demand,⁴ and a party let in on condition of finding security was held not a tenant after two years' stay.⁵ A servant on ceasing to occupy as such does not become at once a tenant.⁶ If the owner agrees to give a lease and the tenant enters, but the owner then refuses, and tenant quits, the tenant is not liable for use and occupation.⁷ Where a ferry company operating a ferry across a navigable river, and owning the land at the landing and about the approaches to it, contracted with a railway company for the use of the land for the purposes of its business so long as it should be needed for such purposes, the railroad to pay the taxes on the land and not to interfere with the ferry, and to employ the ferry in its transportation across the river; it was held that this contract did not create the relation of landlord and tenant, no rent having been reserved, claimed, or paid during the occupation.⁸]

¹ Doe v. Pullen, 2 Bing. (N. C.) 749; Doe v. Quigley, 2 Camp. 505; Doe v. Cartwright, 3 B. & A. 326; Fisk v. Moores, 11 Rob. La. 279.

² Benjamin v. Benjamin, 5 N. Y. 388.

³ McEldery v. Flanagan, 1 H. & G. 808.


⁴ Howard v. Carpenter, 22 Md. 10.

⁵ Doe v. Butt, Walm. & H. 3.

⁶ Kerrains v. The People, 60 N. Y. 221.

⁷ Greton v. Smith, 33 N. Y. 445.

⁸ Wiggins Ferry Co. v. Ohio & Miss. Railway, 142 U. S. 396. One who, by parol, purchases land and by consent of the vendor takes and

§ 22. **Implication from Tenant's holding over.**  A tenant for years who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant.¹ But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year if the landlord so elects,² although the tenant has refused to renew the lease, and given notice that he has hired other premises.³ In Massachusetts and holds possession and makes improvements, with no agreement for rent, is not liable for rent while the contract remains executory. *Bishop v. Clark*, 82 Me. 532. See *Jewell v. Harding*, 72 Me. 124; *Harkness v. McIntire*, 76 Me. 201; § 20, *ante*. It is held, broadly, that when the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the relation of landlord and tenant exists until it is lawfully terminated. *Neppach v. Jordan*, 15 Or. 308.

¹ *Rowan v. Lytle*, 11 Wend. 619; *Giles v. Comstock*, 4 N. Y. 270; *Den v. Adams*, 7 Halst. 99; *Adams v. Decker*, 6 *id.* 84; *Townley v. Rutan*, Spen. 604; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Providence County Sav. Bk. v. Hall*, 16 R. I. 154; *Geadwell v. Holcolmb*, 60 Ohio St. 427; *Deitrich v. Ely*, 24 U. S. App. 21; *Goldsborough v. Gable*, 140 Ill. 269. The rule will not apply when the tenant holds over with the landlord's consent, as pending negotiations for a new lease. *Smith v. Alt*, 7 Daly, 492; s. c. 4 Abb. (N. C.) 205. Nor to the case of tenancy of personal property. *Chase v. Sec. Ave. R. R. Co.*, 97 N. Y. 384.

² *Conway v. Starkweather*, 1 Den. 113; *Witt v. New York*, 5 Rob. (N. Y.) 248; 6 *id.* 441; *Vrooman v. Kaig*, 4 Md. 450; *Moore v. Beasley*, 3 Ohio, 294; *People v. Paulding*, 22 Hun, 91; *Elwood v. Forkel*, 35 *id.* 202; *Wolffe v. Wolffe*, 69 Ala. 549; *Zippar v. Reppy*, 15 Col. 260; *Parker v. Paige*, 41 Or. 579; *San Antonio v. French*, 80 Tex. 575. In Wisconsin, the rule is statutory, § 2187, S. & B. Ann. Sts.; *Peehl v. Bumbalek*, 99 Wis. 62. In Maine and Minnesota, the tenancy, upon a holding over, is from month to month. R. S. Me. c. 73, § 10; c. 94, §§ 1, 2; *Franklin L. M. & Water Co. v. Card*, 84 Me. 528; Minn. G. S. c. 75, § 40; *Roach v. Peterson*, 47 Minn. 291; *Flint v. Sweeney*, 49 Minn. 509; *Shirk v. Hoffman*, 57 Minn. 230. As to effect of holding over under an agricultural lease, see *Kuhn v. Smith*, 125 Cal. 615. In Iowa, Code, § 2991, a holding over is presumed to be under a tenancy at will. *German State Bank v. Herron*, 111 Iowa, 25, and see *O'Brien v. Troxel*, 76 Iowa, 760. The rule is statutory in Kansas, G. S. c. 55, § 2; *Adams Exp. Co. v. McDonald*, 21 Kan. 680.

³ *Schuyler v. Smith*, 51 N. Y. 309; *Bacon v. Brown*, 9 Conn. 334;

other New England States where tenancies for years are unknown, a tenant holding over is said to be in merely by sufferance.¹ He remains a trespasser, and can only become a tenant by mutual agreement.² But when mutual consent is required, the occupant of a house by submitting to a distress for rent, which is stated in the notice of distress to be due by him to the person distraining, has been held to acknowledge a tenancy from that person.³ [A holding over after a notice from the landlord that if the tenant remains it will be at certain terms, is an acceptance of those terms.⁴ So a tenant holding over under a treaty for a lease is at will, not sufferance.⁵ Payment of a quarter's rent, by one in actual occupation, is evidence of a yearly tenancy, at the rent proportioned to the quarterly payment.⁶] And where a

Hemphill v. Flynn, 2 Pa. St. 144; *McGregor v. Rawle*, 57 Pa. St. 184; *Noel v. McCrory*, 7 Coldw. 623.

¹ The fact that a lessor had been in the habit of renewing a tenant's lease whenever it expired, and that both landlord and tenant intended to continue their relations indefinitely on the same terms, gives the tenant no property in the nature of an English customary tenant right; and even if such intention added to the salable value of the lease the addition would represent a speculation on a chance not a legal right. *Emery v. Boston Terminal Co.*, 178 Mass. 174. See, apparently *contra*, *Baltimore v. Rice*, 73 Md. 307.

² *Edwards v. Hale*, 9 Allen, 462; *Ellis v. Paige*, 1 Pick. 43; *Withers v. Larrabee*, 48 Me. 570; *Ackerman v. Lyman*, 20 Wis. 454; *Russell v. Fabyan*, 34 N. H. 218. And such seems to be the law in England. In the leading case, *Right v. Darby*, 1 T. R. 159, 162, Lord Mansfield says, "If there be a lease for a year and by consent of both parties the tenant continues, they are supposed to have renewed the old agreement, which was for a year." In *Ibbs v. Richardson*, 9 Ad. & E. 849, the tenant holding over was sued for a year's rent as holding from year to year, but held liable only for time he had occupied. So *Cobb v. Stokes*, 8 East, 358; *Levi v. Lewis*, 6 C. B. N. s. 766; *Church v. Gas Co.*, 6 Ad. & E. 854. In New Jersey, he seems to be a tenant by sufferance. *Moore v. Smith*, 56 N. J. L. 446. See *Commonwealth v. Knarr*, 135 Pa. 35.

³ *Panton v. James*, 3 Camp. 372.

⁴ *Griffith v. Knisely*, 75 Ill. 361.

⁵ *Emmons v. Scudder*, 115 Mass. 367.

⁶ *Morris v. Niles*, 12 Abb. Pr. 103; *Richardson v. Langridge*, 4 Taunt. 128; *Knight v. Bennett*, 3 Bing. 361. But see *Blumenberg v. Myers*, 32 Cal. 93; *Stoppelkamp v. Mangeot*, 42 *id.* 307; *Skaggs v. Ekers*, 45 *id.* 154, that the only tenancy is for the period for which the

tenant, after the expiration of his term, remained in possession, claiming to hold until the landlord should pay him the appraised value of the improvements he had made during the term, which by a provision of the lease the landlord was bound to do; he was held not to be discharged from the payment of rent, but to come under the general rule that a tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to the terms and conditions of the original lease.¹ [The landlord is subject to the same rule, and can recover no more than the rent originally reserved; nor is he entitled to an increased rent, proportioned to the increased value of the premises.² Where the tenant holding over paid during a part of the time of such holding a rent greater than that reserved in the lease, it was held, notwithstanding, that the continuance of the occupation, and the payment and receipt of rent implied a renewal of the lease from year to year upon the same terms, save as modified as to amount of rent, and that the lessee might avail himself of the benefits of the covenants "contained in the original lease."³ Notice being given to the tenant that if he occupied beyond the subsisting term he must pay an increased rent, naming the sum, the tenant, although he held over, was held not bound to pay the increased rent unless he assented. But such assent may be inferred if he holds over and remains silent.⁴]

rent was actually paid, or agreed to be paid. Where a mortgagee, notwithstanding a former lease of the property, acknowledged himself to be in possession, and promised to pay rent, he was held to have thereby created the relation of landlord and tenant. *Goodman v. Jones*, 26 Conn. 264.

¹ *Holsman v. Abrams*, 2 Duer, 435. See *Dubuque Lumber Co. v. Kimball*, 111 Iowa, 48; *Drake v. Wilhelm*, 109 N. C. 97; *Banbury v. Sherin*, 4 S. Dak. 88, Comp. Laws, § 3741; *Goldsboro v. Gable*, 140 Ill. 269. So when lessor and lessee are tenants in common of the premises. *Harry v. Harry*, 127 Ind. 91. The payment of rent by the tenant holding over is evidence, merely, of an affirmance. *Wilcox v. Montour Co.*, 147 Pa. 540. See § 23.

² *Ibid.* See *Emery v. Boston Terminal Co.*, 178 Mass. 174; *Johnson v. Johnson*, 62 Minn. 302.

³ *Clarke v. Howland*, 85 N. Y. 204.

⁴ *Galloway v. Kerby*, 9 Bradw. (Ill.) 501; *Lautman v. Miller*, 158

§ 23. Fact of, not conclusively presumed from Receipt of Rent. — But the receipt of rent is only a *prima facie* acknowledgment of the existence of a tenancy, and is always subject to explanation; for where the amount received does not appear to have been paid as rent, or bears but a small proportion to the annual value of the premises, the rule does not apply;¹ [and it is a question of fact whether a payment of rent is intended as an acknowledgment of a tenancy.²] If a lease is not void, but voidable only, the receipt of rent under it does not create a new tenancy, although it may establish a former one.³ Nor will a new tenancy be created by a mere agreement for an increase of rent in the middle of a term.⁴ [Nor, on the other hand, will a verbal license by a tenant to the landlord for the occupation by the latter of part of the demised premises at a certain rate, vary a written agreement between them as to the amount of rent.⁵ And

Ind. 382. As to the distinction between a "holding over" and a "re-letting," provided for in the lease, as affecting the covenants contained in the lease, see *Moseley v. Allen*, 138 Mass. 81. It is a question of fact whether a temporary and partial occupation of the premises after the expiration of the lease amounts to a renewal. *Elevator Co. v. Brown*, 36 Ohio St. 660. The wrongful withholding of leased premises after notice of intention to quit subjects the lessee to liability for double rent under § 2185, R. S. (Wis.); *Alliance Elevator Co. v. Wells*, 93 Wis. 5. But, generally, the yearly rental value of farm lands is a proper measure of the damages occasioned by the wrongful holding over of the lessee. *Butterfield v. Kirtley*, 115 Iowa, 207.

¹ *Right v. Bawden*, 3 East, 260; *Den v. Rawlins*, 10 East, 261; *Claridge v. Mackenzie*, 4 M. & G. 143; *Doe v. Baston*, 11 Ad. & E. 307; *Doe v. Brown*, 7 *id.* 447.

² *Doe v. Wilkinson*, 3 B. & C. 413. Where payment of rent, unexplained, would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which the payment was made, for the purpose of repelling such implication. *Doe v. Crago*, 5 C. B. 90; *Doe v. Francis*, 2 M. & Rob. 57. To create a yearly holding the payment must be in reference to such a holding. *Braythwayte v. Hitchcock*, 10 M. & W. 494. So a demand for rent by the landlord upon a tenant holding over is not conclusive of a consent to convert the holding into a tenancy. *Condon v. Barr*, 47 N. J. L. 113.

³ *Doe v. Bancks*, 4 B. & A. 401.

⁴ *Doe v. Kendrick*, cited in *Adams, Eject.* 129; *Geekie v. Monk*, 1 Car. & K. 370; 5 Q. B. 841.

⁵ *Hilton v. Goodhind*, 2 C. & P. 591.

where there was a letting by two tenants in common, at an entire rent, and one of them afterwards gave notice to the lessee to pay a moiety of the rent to him, it was held to be a question for a jury whether the notice created a new contract, or only changed the mode of receiving rent.¹ Generally, if rent is not paid and received as such, but for some other consideration, such payment will not be considered evidence of a design to establish a tenancy.²

§ 24. **Mere Joint Occupancy, or Occupancy on Shares not a Tenancy.** — Mere participation in the profits of land, with a joint occupation or an occupation which does not exclude the owner from possession, will not amount to a tenancy.³ This was held where the agreement between the defendant and a hotel company was, that the defendant should reside with his family in the hotel, free of charge for board, conduct the same in the manner contemplated by the parties, and have the exclusive management thereof, and that the furniture, at the end of the term, should be restored to the company by the defendant.⁴ So where the landowner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant, but a mere employee, and the ownership of the entire crop is in the landowner.⁵ [A deed conveying the right to enter and prospect mines, with exclusive right to one acre round each mine, was held not to exclude the owner, and to be not a lease, but a license only.⁶ But from the nature of gas and gas operations, the grant of an oil-well right is necessarily exclusive, even although the grantee

¹ *Powis v. Smith*, 5 B. & A. 850.

² *Right v. Bawden*, 3 East, 260; *Den v. Rawlins*, 10 *id.* 261; *Strahan v. Smith*, 4 Bing. 91; *Phillips v. Mosely*, 1 C. & P. 262; § 25, *post*.

³ *Burgie v. Davis*, 34 Ark. 179; *Shields v. Purnell*, 64 Ala. 504. But now, in Alabama, by statute, renting on shares creates the relation of landlord and tenant. See *Wilson v. Stewart*, 69 Ala. 302.

⁴ *State v. Page*, 1 Spear, 408. See *Walker v. Fitts*, 24 Pick. 191; *Johnson v. Carter*, 16 Mass. 443. One staying at an inn or boarding-house is a guest, and not a tenant. Bac. Abr. tit. Inn, c. 5, 6; *Wilson v. Martin*, 1 Den. 602; § 66, *post*.

⁵ *Parrish's Case*, 81 Va. 1.

⁶ *Funk v. Haldeman*, 53 Pa. St. 229.

thereof be merely a licensee.¹] Permission to a laborer and his wife to occupy a house on the farm where they work in part compensation for services, does not create a tenancy.² So, if land is to be cultivated on shares, the agreement does not amount to a lease with rent to be paid in produce, for the possession of the land remains in the owner and the parties are merely tenants in common of the crop.³ But if the lessee agrees to pay a certain part of the crop expressly as *rent*,⁴ or if he holds the land with the privilege of an exclusive enjoyment, there is a tenancy for the time agreed upon though the land may have been taken to cultivate on shares.⁵ So a lease reserving, in terms, as rent, the crops to

¹ *Brown v. Spilman*, 155 U. S. 665. See § 17 *a, ante*.

² *Haywood v. Miller*, 3 Hill, 90; *People v. Annis*, 45 Barb. 304; *McQuade v. Emmons*, 9 Vroom, 397; *Doyle v. Gibbs*, 6 Lans. 180; *Sutherland v. Carter*, 52 Mich. 471; *Kerrains v. People*, 60 N. Y. 221; *Smith v. Rice*, 56 Ala. 417; *Hunt v. Colson*, 3 Moore & S. 790. But see *Hughes v. Chatham*, 5 M. & G. 54.

³ *Oakley v. Schoonmaker*, 15 Wend. 226; *Maverick v. Lewis*, 3 McCord, 211; *Bradish v. Schenck*, 8 Johns. 151; *Edgar v. Jewell*, 5 Vroom, 259; *Daniels v. Brown*, 34 N. H. 454; *Warner v. Hoisington*, 42 Vt. 94; *Messinger v. Warehouse Co.*, 39 Or. 546. Authority to dredge for oysters is a license, and not a lease. *Colchester v. Brooke*, 7 Q. B. 839. The defendant agreed to build houses on the plaintiff's land and procure tenants for the same at a given rate, and to pay the rent till he so procured tenants. It was held that no tenancy was created. *Taylor v. Jackson*, 2 C. & K. 22. In *Curtis v. Cash*, 84 N. C. 41, an arrangement by which A. was to furnish land, team, and feed therefor, and B. was to devote his time and attention to the cultivation of the land and pay expenses, the gross products to be divided, was held a partnership. But see *Day v. Stevens*, 88 N. C. 83. Where the lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved. See § 317, *post*. But this rule does not apply to a breach of a contract between a cropper and a landowner. The measure of damages for a breach of contract to furnish a cropper land to be cultivated on shares is such injury as naturally follows as the result of the breach. *Shoemaker v. Crawford*, 82 Mo. App. 487.

⁴ *Hoskins v. Rhodes*, 1 Gill & J. 266; *Newcomb v. Agan*, 2 Johns. 421; *Alwood v. Ruckman*, 21 Ill. 200; *Durant v. Taylor*, 89 N. C. 851; *Irwin v. Mattox*, 138 Pa. 466.

⁵ *Jackson v. Brownell*, 1 Johns. 267; *Tuttle v. Bebee*, 8 *id.* 152; *De Mott v. Hagarman*, 8 Cow. 220; *Doremus v. Howard*, 8 Zab. 890; *Fry v. Jones*, 2 Rawle, 11.

be divided between the parties, creates a tenancy in the land, and the landlord retains an interest in the crops only by express reservation.¹ [A lease upon shares is a personal contract, and, as such, is not assignable where the amount of rent received depends on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they be properly kept.²]

[§ 24 *a*. **When Occupancy on Shares will constitute a Tenancy. — Incidents.** — The early cases held that when the agreement to cultivate on shares was for one crop only the parties were to be considered as tenants in common of the crop, the right of possession still remaining in the owner of the land;³ but that if the agreement was for more than one crop, then such agreement might be construed as a lease.⁴ But this distinction no longer obtains; and the tendency of the modern cases is to construe the agreement as a lease whenever rent, as such, is reserved, or apt terms of demise employed, or the intention to create a lease is clearly to be inferred from the words of the written instrument or from the parol agreement between the parties.⁵ When there is

¹ *Warner v. Abbey*, 112 Mass. 355; *Darling v. Kelley*, 113 *id.* 29; *Geer v. Fleming*, 110 *id.* 39; *Sargent v. Currier*, 66 Ill. 245; *Jordan v. Staples*, 57 Me. 132; *Foster v. Penry*, 71 N. C. 181; *Harrison v. Ricks*, *id.* 7; *Lang v. Weaver*, 49 Ind. 103; *Steele v. Morse*, 52 *id.* 32; *Froot v. Harding*, 56 *id.* 165; *Cunningham v. Baker*, 84 *id.* 597; *Chicago & W. M. Railway v. Linard*, 94 *id.* 319; *Larkin v. Taylor*, 5 Kan. 433; *Strain v. Gardner*, 61 Wis. 174, where an agreement, under seal, to cultivate a farm on shares for one year was held a lease.

² *Randall v. Chubb*, 46 Mich. 311; § 24 *a*, *post*. But see *Dworak v. Graves*, 16 Neb. 706.

³ *Hare v. Celey*, Cro. El. 143; *Bishop v. Doty*, 1 Vt. 37; *Bradish v. Schenck*, 8 Johns. 151.

⁴ *Stewart v. Doughty*, 9 Johns. 108; *Decker v. Decker*, 17 Hun, 13; and see also *Schmitt v. Cassilius*, 13 Minn. 7; *Cooper v. McGrew*, 8 Or. 327.

⁵ *Moulton v. Robinson*, 7 Foster, 550; *Hurd v. Darling*, 14 Vt. 214; *Manwell v. Manwell*, *id.* 14; *Aiken v. Smith*, 21 *id.* 180; *McLellan v. Whitney*, 65 *id.* 510; *Putnam v. Wise*, 1 Hill, 246; *Newcomb v. Agan*, 2 Johns. 421 n.; *Jackson v. Brownell*, 1 *id.* 267; *Orcutt v. Moore*, 134 Mass. 48; *Fry v. Jones*, 2 Rawle, 11; *Burns v. Cooper*, 31 Pa. St. 426; *Lamberton v. Stouffer*, 55 *id.* 284; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon*

an agreement for demise, rent, or exclusive occupation, the relation of landlord and tenant will generally be considered to exist; and the landlord may be entitled to his share of the crop as this is created, by way of reservation, subject to the tenant's possession for purposes of cultivation;¹ but if the share is clearly rent the landlord will acquire no interest in it until it is to be set apart for him by the tenant.² On the other hand, if there appears no agreement for rent, demise, or occupation, but merely for services, to be paid for in part of the crop, the occupant for purposes of cultivation is merely a cropper, having no interest in the crops until division.³ An agreement to "deliver" the landlord's portion of the crop at the end of the season has been construed as creating a demise;⁴ and so, although the landlord is to

v. Nicolls, 39 *id.* 372; *Koob v. Ammann*, 6 *Bradw. (Ill.)* 160; *Hansen v. Dennison*, 7 *id.* 73; *Wells v. Preston*, 25 *Cal.* 59, 67; *Rose v. Swaringen*, 9 *Ired.* 481; *Hatchell v. Kimbrough*, 4 *Jones*, 163; *Blake v. Coates*, 3 *Iowa*, 548; *Hoskins v. Rhodes*, 1 *Gill & J.* 266; *Kilpatrick v. Harper*, 119 *Ala.* 754; *Jordan v. Lindsay*, 132 *id.* 567; *Smith v. Schultz*, 89 *Cal.* 526; *Schlicht v. Callicott*, 76 *Miss.* 487.

¹ *Moulton v. Robinson*, 7 *Foster*, 550; *Hatch v. Hart*, 40 *N. H.* 98; *Brown v. Lincoln*, 48 *id.* 168; *Wentworth v. Railroad*, 55 *id.* 540; *Jewell v. Woodman*, 59 *id.* 520; *Lewis v. Lyman*, 22 *Pick.* 437; *Heald v. Build. Ins. Co.*, 111 *Mass.* 38; *Kelly v. Weston*, 20 *Me.* 232; *Johnson v. Hoffman*, 53 *Mo.* 509, and see *Ferrall v. Kent*, 4 *Gill*, 209; *Smith v. Atkins*, 18 *Vt.* 461; *Esdon v. Colburn*, 28 *id.* 631; *Willmarth v. Pratt*, 56 *id.* 474; *Atkins v. Womeldorf*, 53 *Iowa*, 150; *Sunrol v. Molloy*, 63 *Cal.* 369.

² *Townsend v. Isenberger*, 45 *Iowa*, 670; *Thomas v. Williams*, 82 *Hun*, 257. Where the owner of a farm leased it to a tenant for a year under an oral agreement by which the lessee was to carry on the farm at the halves, and to leave at the end of the term as much hay as he found there at the beginning, and the lessor did not occupy the farm during the term, it was held that the court could not, as matter of law, say that the lessor had during the year such a potential interest in the crops as to enable him to mortgage them. *Orcutt v. Moore*, 134 *Mass.* 48.

³ *Chandler v. Thurston*, 10 *Pick.* 205; *Walker v. Fitts*, 24 *id.* 191; *Chase v. McDonnell*, 24 *Ill.* 236; *Maverick v. Lewis*, 3 *McCord*, 211; *Warner v. Hoisington*, 42 *Vt.* 94; *Huggins v. Wood*, 72 *N. C.* 356; *Rouse v. Wooten*, 104 *id.* 229; *State v. Jewell*, 34 *N. J.* 239; *Adams v. McKesson*, 53 *Pa. St.* 81; *McCutchen v. Crenshaw*, 40 *S. C.* 511.

⁴ *Rinehart v. Olwine*, 5 *W. & S.* 157, 163; *Ream v. Harnish*, 45 *Pa. St.* 379; *Blake v. Coates*, 3 *Iowa*, 548; *Symonds v. Hall*, 37 *Me.* 354.

furnish seed, stock, or farming implements.¹ The earlier cases hold that on such lease the tenant is the owner of the crops until a division is made.² Later cases consider that where land is leased and rent reserved in kind, or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land, during the life of the lease.³ Upon this view of the law, it is held that the interest of either party is a leviable one.⁴ On the other hand, it is held that where a tenant leases a farm and is to pay as rent one half of all the products thereof, he has a half interest in such products and stock, and that it cannot be taken to satisfy the landlord's debts, upon an execution.⁵ A lease upon shares is not assignable

¹ *Warner v. Abbey*, 112 Mass. 355; *Harrison v. Ricks*, 71 N. C. 7; *Brown v. Jaquette*, 94 Pa. St. 113; *Redmon v. Bedford*, 80 Ky. 13. As this doctrine leaves the crop within the lessee's control until delivery, the courts in some States have construed an agreement expressed as a lease, not to be a lease but a tenancy in common of the crop, wherever a division uncertain in amount was stipulated for: *Putnam v. Wise*, 1 Hill, 234; and see *Smyth v. Tankersly*, 20 Ala. 212; *Bernal v. Hovious*, 17 Cal. 541; *Lowe v. Miller*, 3 Gratt. 205; *Aiken v. Smith*, 21 Vt. 172; *Scott v. Ramsey*, 82 Ind. 330; and it was implied that the same relation existed as to the land; and this was distinctly held in *Dinehart v. Wilson*, 15 Barb. 595; *Harrower v. Heath*, 19 *id.* 331. Where there are no clear terms of demise this is, undoubtedly, the relation of the parties. *Caswell v. Districh*, 15 Wend. 379; *Otis v. Thompson*, Hill & Den. 131; *Foot v. Colvin*, 3 Johns. 216; *Guest v. Opdyke*, 31 N. J. 552; *Fiquet v. Allison*, 12 Mich. 330; *De Mott v. Hagarman*, 8 Cow. 220. And where neither demise, rent, nor exclusive occupation is agreed upon, but services to be paid in part of the crop, the occupant is not even tenant in common, but a mere cropper, with no interest until division.

² See cases *supra*, and *Putnam v. Wise*, 1 Hill, 234.

³ *Sims v. Jones*, 54 Neb. 769; *Jones v. Durrer*, 96 Cal. 95; *Shearin v. Riggsbee*, 97 N. C. 216, but see *Jordan v. Bryan*, 103 *id.* 59. No tenancy in common can arise where the rent is payable in cash. *Hargett v. Beardsley*, 33 Or. 30. So trover will not lie against the landlord for the conversion of the tenant's share. *Shearin v. Riggsbee*, *supra*, and see *Richardson v. Wardwell*, 82 Me. 343; *McClure v. Thorpe*, 68 Mich. 33.

⁴ *Sims v. Jones*, *supra*.

⁵ *Stickney v. Stickney*, 77 Iowa, 699. A growing crop planted by a tenant under a contract with the landlord to cultivate and harvest the crop and deliver the landlord a part of it, as rent, is not subject to the levy of an execution. *Tipton v. Martzell*, 21 Wash. 273, where the

without the consent of the lessor, and its attempted assignment and delivery of possession thereunder to the assignee works a forfeiture;¹ and upon a subletting of his term, the lessee becomes liable for cash payment of rent, there being no privity between the lessor and the sublessee.² In the absence of a contrary stipulation, the tenant's share is due when one crop is harvested or within a reasonable time thereafter.³ A contract for the cultivation of a farm in shares, in and by the terms of which the landowner reserves the title to the cropper's share of the crops raised, as security for advances made to him, is in legal effect a chattel mortgage.⁴]

§ 25. **Evidence arising from Occupancy may be controlled.** — Nor will the relation of landlord and tenant be inferred from occupation, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause.⁵ As, for instance, between a question is discussed; and *Polley v. Johnson*, 52 Kan. 478, and *Penhallow v. Dwight*, 7 Mass. 84, are distinguished.

¹ *Randall v. Chubb*, 46 Mich. 311; *Lewis v. Sheldon*, 103 *id.* 102; but not where the assignment is oral, and is never carried out. *Grovenburgh v. McKeough*, 117 *id.* 555.

² *Dassance v. Cold*, 101 Iowa, 610.

³ *Jones v. Adams*, 37 Or. 473. The landlord may maintain replevin for his share. *Wattles v. Dubois*, 67 Mich. 313. The tenant's rights expire when the crop is harvested. *Kyte v. Keller*, 76 Iowa, 34 (Code, § 2015).

⁴ *McNeal v. Rider*, 79 Minn. 153. That the plaintiff has let the defendant a farm upon shares is a good consideration for a promise, upon his part, to carry the same on in a good and husbandlike manner. In such case the plaintiff may maintain assumpsit for a breach of that promise. *Reynolds v. Chynoweth*, 68 Vt. 105. The owner of premises, renting them on shares, is held not to have worked eviction by entering after the season is too far advanced to plant the crop, and clearing the land of weeds. *Culley v. Taylor*, 62 Neb. 941.

⁵ *Osgood v. Dewey*, 13 Johns. 240; *Curtis v. Treat*, 21 Me. 525. In *Constant v. Abell*, 26 Mo. 174, 181, where the government took possession of demised premises, and paid lessee rent, it was held that he was not liable to lessor for government's occupation after his term expired; for though he had received rent he had never let the government in. So the owner cannot hold as tenant one who took possession under a pretended sheriff's sale, *Nance v. Alexander*, 49 Ind. 516. So where a tenant for

vendor and vendee of land, where the purchaser is to have possession until the agreement for purchase is completed or rescinded; for possession was evidently taken in such case with the understanding of both parties that the occupant should be owner and not tenant; and the other party cannot, without his consent, convert him into a tenant, so as to charge him with rent.¹ [In such case, in the absence of a contrary understanding between the parties, the vendee's possession is that of a licensee, determinable by a mere demand and the common law action of ejectment would lie against him, without a notice to quit,² and this is so even although he has paid a portion of the purchase-money.³ He is not entitled to emblements or fixtures, nor is he estopped to deny the vendor's title.⁴ He is not subject to an action for use and occupation,⁵ nor to ordinary landlord and tenant process.⁶ But where there is an agreement between the life of another continued in possession without the consent of the owner, after the determination of the life-estate. *Livingston v. Tanner*, 4 Kern. 64; *Buck v. Binninger*, 3 Barb. 391; *Freeman v. Ogden*, 40 N. Y. 105.

¹ *Coffman v. Hack*, 24 Mo. 496; *Brown v. Persons*, 48 Ga. 60; *Ripley v. Yale*, 16 Vt. 257.

² *Doe v. Stanion*, 1 M. & W. 700; *Right v. Beard*, 13 East, 210; *Doe v. Chamberlaine*, 5 M. & W. 14; *Doe v. Edgar*, 2 Bing. N. C. 498; *Doe v. Miller*, 5 C. & P. 595; *Doe v. Jackson*, 1 B. & C. 448; *Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Kingsley*, 17 *id.* 158; *Sprague v. Stone*, 20 Barb. 509; *Love v. Edmonstone*, 1 Ired. 152; *Kratemayer v. Brink*, 17 Ind. 509; *Richardson v. Thornton*, 7 Jones, 458; *Brewer v. Craig*, 3 Har. 214.

³ *Banks v. Rebbeck*, 2 Lowndes, M. & P. 452; *Doe v. Stanion*, 1 M. & W. 695; *Ball v. Cullimore*, 2 C. M. & R. 120.

⁴ *Watkins v. Holman*, 16 Pet. 25; *Harris v. Frink*, 50 N. Y. 24; *King v. Johnson*, 7 Gray, 239.

⁵ *Rogers v. Wiggs*, 12 B. Mon. 504; *Benson v. Boteler*, 2 Gill, 74; *Ayer v. Hawkes*, 11 N. H. 148; *Sylvester v. Ralston*, 31 Barb. 286; *Thomson v. Bower*, 60 *id.* 463; *Fall v. Hazlerigg*, 45 Ind. 576; *Dunning v. Finson*, 46 Me. 546; *Kirtland v. Pounsett*, 2 Taunt. 145; *Hearn v. Tomlin*, Peake, 192; *Winterbottom v. Ingham*, 7 Q. B. 611; *Corrigan v. Woods, Jr.* R. 1 Com. L. 73; *McNair v. Schwarz*, 16 Ill. 24; *Greenup v. Vernor*, *id.* 26; *Hadley v. Morrison*, 39 *id.* 392.

⁶ *Dakin v. Allen*, 8 Cush. 33; *Kiernan v. Linnehan*, 151 Mass. 543; *Riley v. Jordan*, 75 N. C. 180; *Johnson v. Hanser*, 82 *id.* 375; *Dunham v. Townsend*, 110 Mass. 440; *Reeder v. Ball*, 7 Bush, 255; *Banks v. Reb-*

parties by which the vendee is to have peaceable possession for a consideration to be treated as rent, although in the form of interest upon the purchase note, the vendee becomes the tenant of the vendor.¹] But if the vendee remains in possession after such an agreement has been rescinded, though a tenant at will so as to be subject to removal without notice, he is liable in use and occupation while he remains.² Nor can the relation of landlord and tenant exist where the occupant holds the position of trustee to the party entitled,³ nor between a vendor and vendee where the vendor retains possession after the sale,⁴ unless there has been a

beck, *supra*; *Burnett v. Scribner*, 16 Barb. 621. In *Gould v. Thompson*, 4 Met. 224, following *Hull v. Vaughan*, 6 Price, 157, the vendee was held liable in use and occupation; but this case seems contrary to the weight of authority. In *Towne v. Butterfield*, 97 Mass. 105, *Gould v. Thompson* is cited as authority, and a vendee so occupying held estopped to deny vendor's title. But in *Dunham v. Townsend*, *supra*, both these cases are referred to as relating to the period after a rescission.

¹ In *White v. Livingston*, 10 Cush. 259, the vendee had an agreement for peaceable possession so long as he paid interest on his purchase-note, "which both parties treated as rent," and this was held to be a lease. This is undoubtedly correct where the money is paid as compensation for the land. *Saunders v. Musgrove*, 6 B. & C. 524; *Graham v. Way*, 38 Vt. 19. But see *Davis v. Hemmenway*, 1 Wms. (Vt.) 589. But in the former case interest only was paid; and the payment of interest on his purchase-money by the vendee does not make him a tenant: *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Edgar*, 2 Bing. N. C. 498; *Banks v. Rebbeck*, *supra*; *Dakin v. Allen*, 8 Cush. 33; *Dunham v. Townsend*, *supra*; and see *Dolittle v. Eddy*, 7 Barb. 74. But where a vendee is already in as tenant, his possession is to be referred to the tenancy, and not to his intended purchase. *Blanchard v. McDougal*, 6 Wis. 167. Where he agrees to pay a stipulated rent at the end of the year, if he shall fail to pay the purchase-money, he is liable as tenant. *Vick v. Ayres*, 56 Miss. 670. *Aliter*, if the conveyance is defeated by the vendor's fault. *Garvin v. Jennerson*, 20 Kan. 371; *Lyon v. Cunningham*, 136 Mass. 532.

² *Dunham v. Townsend*, 110 Mass. 440; *Dwight v. Cutler*, 3 Mich. 516; *McLaughlin v. Nash*, 14 Allen, 136, where it was also held that he was only entitled to fixtures as between vendor and vendee. So he becomes liable for use and occupation where the contract of sale was wholly void. *Mattox v. Hightshee*, 39 Ind. 95; *Howard v. Shaw*, 8 M. & W. 118.

³ *Russell v. Erwin*, 38 Ala. 44; *McCreels v. Wallace*, 71 N. C. 587.

⁴ *Tew v. Jones*, 13 M. & W. 12; *Goldsberry v. Bishop*, 2 Duv. 143; *Currier v. Earl*, 13 Me. 216; *McCreels v. Wallace*, *supra*; *Jackson v. Aldrich*, 13 Johns. 106; *Mott v. Coddington*, 1 Rob. (N. Y.) 267.

conveyance of the property, in which case the presumption will be that he is in rightfully, and as tenant to the grantee.¹ The same principle applies to the case of a mortgagor and mortgagee; and to that of the tenant of a mortgagor by a demise subsequent to the mortgage, and the mortgagee or his assignee; for no privity of estate exists between them in either case.² So with respect to the guardian or trustee of an infant, or to a husband seised in right of his wife; neither of these persons, holding over after the determination of their respective estates, become tenants; they are mere intruders and trespassers.³ And, generally, it may be said that a tenancy by implication can never arise under a party who has not the legal estate of the premises in question.⁴ [When it appears upon the face of the instrument that the party intending to demise has no power to demise, the instrument is not a lease.⁵]

SECTION II.

BY AN EXPRESS AGREEMENT.

§ 26. **Leases by Parol or Deed.** — When a tenancy is created by an express agreement, it is either by parol or by deed. The former mode embraces all cases where the parties agree by word of mouth or by a writing not under seal. No particular form of expression is necessary, in either case, to

¹ *Sherburne v. Ives*, 20 Mo. 70.

² *Way v. Raymond*, 16 Vt. 371.

³ *Jackson v. Rowland*, 6 Wend. 666; and see *Roach v. Cozine*, 9 *id.* 231; *Carlisle v. McCall*, 1 Hilt. 399; for by the common law whoever came in by act of law and held over, as a guardian, husband, or trustee, became a mere trespasser, but he who entered by act of the party entitled and held over was tenant at sufferance. Such was the case of a tenant *pur autre vie*. *Allen v. Hill*, Cro. El. 238; *Torrey v. Torrey*, 14 N. Y. 430; *Horsev v. Horsev*, 4 Harr. 517. Thus in *Whitney v. Dart*, 117 Mass. 153, the husband of the grantee in fee subject to the grantor's life-estate, who had entered and occupied under the life-tenant, was held not the tenant of his wife's lessee, after the life-estate ended. See *Wills v. Wills*, 34 Ind. 106; *Chamberlain v. Dunshee*, 45 Vt. 50.

⁴ *Morgell v. Paul*, 2 Mann. & R. 303. But see § 124 *a*, *post*.

⁵ *Hayward v. Haswell*, 6 A. & E. 265.

create an immediate demise; but a reservation of rent, in some form and some admission of allegiance to the title are the characteristics of a contract by which the relation of landlord and tenant is created. Any permissive holding is sufficient for the purpose, and may be contained in letters, or in a memorandum of the contracting parties.¹ And any phraseology will establish the fact of a tenancy from which it appears to have been the intention of one of the parties to dispossess himself of the premises [for a consideration,] and of the other to assume the possession for any determinate period, whether the words used are in the form of a license, a covenant, or an express agreement.² [But a mere authority from the owner of land to another to occupy, not accompanied by anything showing a contract for possession on one side and for a recompense to be paid on the other, is not a lease, nor does it convey any interest in the land.³ The State grant of a franchise by the State for a limited time, after which it is to revert to the State, is not a lease.⁴]

¹ *Lindsley v. Tibbals*, 40 Conn. 522; *Shaw v. Farnsworth*, 108 Mass. 347; *Johnson v. Phoenix Mut. Life Ins. Co.*, 46 Conn. 92; *Alcorn v. Morgan*, 77 Ind. 184.

² *Moshier v. Reding*, 3 Fairf. 478; *Maverick v. Lewis*, 3 McCord, 211; *Caswell v. Districh*, 15 Wend. 379; *Right v. Proctor*, 4 Burr. 2208; *Chapman v. Bluck*, 5 Scott, 531; *Waller v. Morgan*, 18 Ky. 142. A receipted bill of sale of hay and oats with a memorandum: "Left at stable on O. street where P. takes possession. Rent to begin October 1, 1870, for one year at \$150," signed and dated, was held a lease, and parol evidence was admitted to identify and describe the premises and prove occupation. *Eastman v. Perkins*, 111 Mass. 30. So a receipt for \$10 "from C. on rent of store on corner of Z. (No. 22) and C. streets, which C. is to have for a \$100 a month until May, 1873," dated and signed. *Remington v. Casey*, 71 Ill. 317. See also *Smith v. Simmons*, 1 Root, 318; *Munson v. Wray*, 7 Blackf. 403; *Mun'y No. 1 v. N. Orlean*, 5 La. Ann. 761; *Bacon v. Bowdoin*, 22 Pick. 401; *People v. Kelsey*, 14 Abb. Pr. 372.

On a contract for the sale of lands, the parties may, by express stipulation, agree that, on default in the payment of the purchase-money, the contract shall be treated as a lease, the option being reserved to the purchaser in the first instance, and passing to the vendor on his failure to elect; and, when an election is made, it relates back to the time of the contract, and creates the relation of landlord and tenant from that day, with all its incidents. *Drum v. Harrison*, 83 Ala. 388.

³ *Branch v. Doane*, 17 Conn. 411.

⁴ *Bridge v. Proprietors*, 1 Fab. 384.

§ 27. **Parol Leases for Years valid at Common Law.** — Leases for years being considered mere chattel interests arising out of a contract between the parties and passing only a transient interest in the land, and not a freehold; might at common law have been made by parol for any certain period. The contract gave the lessee a right to enter upon the land with a present interest; and when, in pursuance of such right, he entered, the object of the contract was accomplished, the *term* vested in the lessee, the *seisin* still remaining in the freeholder. But as the tenant was never technically seised and held only in the name of his lord, he could not defend himself in a real action; and he was liable to be dispossessed at the pleasure of the tenant of the freehold, by his suffering a common recovery.¹ So precarious an interest in the tenant was found to be prejudicial to agriculture; forasmuch as there was no encouragement for a tenant to improve and cultivate the land in a proper manner. His interest was rendered less insecure by a change in the law near the end of the reign of Henry VI.,² which gave him a right to recover, when unjustly evicted, not only damages for the loss of his possession, but the possession itself. The term [for years] became a certain interest by 21 Hen. VIII., which enabled a lessee for years to falsify a recovery to his prejudice; and subsequent enactments increased the security and permanence of his tenure.

§ 28. **Rule changed by Statute of Frauds.** — The statute of 29 Car. II. c. 3, called the Statute of Frauds, provided that all leases, estates, or terms of years, or any uncertain interest in land, created by livery only, or by parol, and not reduced to writing and signed by the party making the same, or his agent, should have no other force or effect than to create an estate at will; except leases for a term not exceeding three years, whereon the rent reserved should amount to two

¹ Co. Lit. 46, a; Theobals v. Duffoy, 9 Mod. 102; Shep. Touch. 210.

² Poole v. Errington, 1 Ad. & E. 756, where it is said to have been a judicial change between 6 Rich. II. (A. D. 1383) and 7 Edw. IV. (A. D. 1468). Smith, Landl. & T. 11, says between 1455 and 1458, referring to 33 Hen. VI. fol. 42 (A. D. 1455), to show that it had not then occurred.

thirds of the full improved value of the premises.¹ The leading provisions of this statute have been adopted generally in the United States. Thus in New York no lease or contract for leasing for more than a year is good except in writing, signed by the party or his agent, who in the former case must be authorized in writing.²

¹ By 8 & 9 Vict. c. 106, §§ 2, 3, such writing must be under seal. Similar provisions exist in Vermont, Rhode Island, and Delaware applicable to leases over one year in point of duration, in which it appears that the rent was two thirds the improved value; which is held to mean the annual value. This requirement also exists in New Jersey, *Gano v. Vandever*, 34 N. J. 293, although the meaning given to *improved value* is total value. In Maryland rent of such value is presumed in the absence of contrary evidence. *Union Bk. v. Gittings*, 45 Md. 180.

² 2 R. S. 135, § 8. In the statutes of some States, the words "authorized by writing" are omitted; and it is sufficient that the agent have verbal authority to contract, provided the contract itself is in writing; but authority to make a deed must still be in writing. See *McWhorter v. McMahan*, 10 Paige, 394; *Champlin v. Parish*, 11 *id.* 405; *Agate v. Gignoux*, 1 Rob. N. Y. 278; *Benedict v. Beebee*, 11 Johns. 145; *Lower v. Winters*, 7 Cow. 263. In Indiana, a parol lease for an indefinite time, the tenant taking possession, is a tenancy from year to year, and not within the Statute of Frauds. See 2 R. S. 1876, p. 368, § 2, and *Swan v. Clark*, 80 Ind. 57. In *McMullen v. Riley*, 6 Gray, 500, an oral agreement to hire and pay landlord for fitting up the premises was held to give no action for such fitting up. So landlord's agreement to repair, in consideration of which tenant enters, occupies, and pays rent, is within the statute. *O'Leary v. Delany*, 63 Me. 584. But where the tenant builds or repairs, on the promise of a lease to which the statute is set up a bar, he may recover the value of his work. *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 *id.* 185; *Pullbrook v. Lawes*, 1 L. R. Q. B. Div. 284. But making improvements, or advance payments of rents under a parol contract for a lease for more than a year, cannot, in law or equity, extend the tenancy beyond the year. *Brockway v. Thomas*, 36 Ark. 518; *Beck v. Birdsall*, 19 Kan. 550; *Railsback v. Walker*, 81 Ind. 409; *Creighton v. Sanders*, 89 Ill. 543. In Montana, under the Civil Code, sect. 2281, a contract in writing may be altered by a contract in writing or by an executed oral agreement. *Armington v. Steile*, 27 Mont. 573. A provision in a lease for five years, for an extension for a like period, on the same terms, at the option of the lessee, by notice in writing, at least three months before the expiration of the first term, is not within the Statute of Frauds, as the term embraced in the renewal is created and defined by the lease itself. *McClelland v. Rush*, 150 Pa. St. 57. In Louisiana, a verbal contract of lease, complete in itself and unaccompanied by an intention to have the same reduced to writing as perfecting it, is an enforce-

§ 29. **How limited in Different States.** — In Massachusetts, all estates and interests in land created without a writing, whether an annual rent is reserved or not, are, by the statute, estates at will only.¹ So in Missouri, Ohio, Maine, Vermont, and New Hampshire. In Connecticut, leases of land for a term exceeding a year are invalid, except as against the grantor, unless they be in writing, and signed by the lessor in the presence of two witnesses, and acknowledged. Pennsylvania, Indiana, and North Carolina partially follow the English statute, and allow parol leases, not exceeding three years, without any provision as to the reservation of rent, or other consideration for the making of the contract. In New Jersey, Maryland, and South Carolina, the English statute is followed; but in other States the principles of the New York statute have been adopted.² [It would seem to be obvious that a parol lease of real estate for the term of one year, to commence *in futuro*, is invalid under the Statute of Frauds, being an agreement which by its terms is not to be performed within one year from the making thereof;³ but the question has been the subject of ingenious discussable contract. But if when a verbal contract of lease is agreed on, it is intended, that it should be reduced to writing, that the written lease should take the place of what had been agreed on verbally; then until the writing is signed, the contract is inchoate, and either party may before signing recede. *Laroussini v. Werlein*, 52 La. Ann. 424. Where after the death of the tenant during the term, his wife in consideration of retaining possession for the rest of the term agreed to pay the reserved rent, this was held not to be within the Statute of Frauds. *Linam v. Jones*, 134 Ala. 570.

¹ Pub. Sts. c. 120, § 3; *Ellis v. Paige*, 1 Pick. 43.

² The effect of the statute is limited to the contract. If possession is taken and held under it, the tenant becomes from year to year; the terms of the contract controlling *prima facie*. *Drake v. Newton*, 3 Zab. 111; *Lounsberry v. Snyder*, 31 N. Y. 514; and see § 58, *post*.

³ *Jellett v. Rhodes*, 43 Minn. 166. So in California under Civil Code, § 1624, *Wickson v. Monarch Cycle Co.*, 128 Cal. 156; in Oregon, *White v. Holland*, 17 Or. 3; and in Alabama, after much discussion, see Code § 1732; *Garner v. Ullman*, 99 Ala. 318; *Rhodes Furn. Co. v. Weeden*, 108 *id.* 252; *Blain v. McDonald*, 11 *id.* 269. But possession under such a lease, in Alabama, creates the relation of landlord and tenant on which the action for use and occupation will lie. *Howard v. Jones*, 123 Ala. 488.

sion,¹ and a contrary rule has been held in Tennessee,² Mississippi,³ and South Carolina.⁴ In Iowa, part performance of an oral contract to lease land for a term of more than one year will not take the case out of the statute.⁵]

§ 30. **Agreements to lease under Statute of Frauds.** — By the English Statute of Frauds, every agreement not in writing and signed by the party to be charged therewith, or his authorized agent, is void, if, by its terms, it is not to be performed within one year from the making thereof. A verbal agreement to lease lands must, therefore, commence from the making of the agreement, and not from a future day.⁶ In most of the United States similar statutory provisions exist.⁷ In

¹ *Hayes v. Arrington*, 108 Tenn. 494.

² *Ibid.* See Sta. Tenn. § 3142 (S.); § 2463 (M. & V.); § 1758 (T. & S.).

³ *McCroy v. Toney*, 66 Miss. 233.

⁴ *Hillhouse v. Jennings*, 60 S. C. 392. See Rev. Sta. S. C. §§ 1932, 2149, 2151.

⁵ *Thorpe v. Bradley*, 75 Iowa, 50; *Burden v. Knight*, 82 *id.* 584; *Powell v. Cunningham*, 102 *id.* 364. See Code, Iowa, §§ 3364, 3365. See *Phelan v. Anderson*, 118 Cal. 504. The owner of a written lease of a building having three years to run verbally sublet a portion of the leased premises at a monthly rental. It was held that the sublessee acquired an interest in land, within the meaning of How. Stat. § 6179, which prohibits the creation by parol of any estate or interest in lands, other than leases for a term not exceeding one year. *Fratcher v. Smith*, 104 Mich. 537. In Pennsylvania the statute is satisfied by a note in writing not under seal stating the terms of the lease and designating the land, signed by the party called on to fulfil it, and accepted by the other party. *Witman v. Reading*, 191 Pa. 134.

⁶ *Rawlins v. Turner*, 1 Ld. Ray. 736; *Anon.*, 12 Mod. 610. An executory agreement for a lease does not satisfy the Statute of Frauds unless it can be collected from it on what day the term is to begin; and there is no inference that the term is to run from the date of the agreement in the absence of language in the agreement pointing to that conclusion. *Marshall v. Berridge*, 19 Ch. D. 233, overruling *Jaques v. Miller*, 6 *id.* 153.

⁷ *Delano v. Montague*, 4 Cush. 42; *Kelley v. Terrell*, 26 Ga. 551; *Larkin v. Avery*, 23 Conn. 304; *Stackberger v. Mosteller*, 4 Ind. 461. So in Georgia, Code, 2280. Part performance, as by entry and payment, will take the case out of the operation of the Statute. *Steininger v. Williams*, 63 Ga. 475. The Revised Statutes of New York have omitted the words "*within one year from the making thereof*," which were held to prohibit the creation of an estate for a year commencing *in futuro*, and it is held that

those States where leases not exceeding three years are excepted from the operation of the statute, the limitations of contracts to a year provided by the fourth section of the English statute do not apply.¹ [Since a written lease, generally, can be altered only by a contract in writing, or by an oral agreement executed wholly or in part, evidence of a parol to change the time for payment of rent from that expressed in the lease is inadmissible.² When a sublease is indorsed on an original lease in which the rented premises are described, a specific reference in the sublease to the description contained in the original lease is a sufficient description under the Statute of Frauds.³ Where a mining company, desiring to lease its mines, advertised that bids would be received therefor to a certain date, and a bid was received within the time designated, stating the terms on which the applicant would take and work the property, which bid and terms were formally accepted by the officers of the company, it was held that the advertisement, the bid, and the acceptance contained all the essential elements necessary to constitute a concluded and valid agreement for a lease, under the Statute of Frauds;

a parol lease of lands for the term of one year, to commence at a period subsequent to the day when the contract was made, is valid, since the time between the making of the lease and its commencement in possession is no part of the *term* granted. *Young v. Dake*, 5 N. Y. 463; *Becar v. Flues*, 64 *id.* 518; overruling *Lockwood v. Barnes*, 8 Hill, 128; *Plimpton v. Curtis*, 15 Wend. 836. See § 29 *a*, *ante*. A parol contract, to give a lease of land for a term exceeding one year, is void. *Phipps v. Ingraham*, 41 Miss. 256; *Shepherd v. Cummings*, 1 Coldw. 354; *Hand v. Osgood*, 107 Mich. 55; *Gladwell v. Holcomb*, 60 Ohio St. 427. An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, when the occupation is to commence at a future day, is an agreement relating to an interest in land, within the meaning of the Statute of Frauds, and must therefore be in writing. *Inman v. Stamp*, 1 Stark. 12.

¹ *Huffman v. Starkes*, 81 Ind. 474; *Union Bk. v. Gittings*, 45 Md. 180; *Birckhead v. Cummings*, 83 N. J. 44; controverting *Inman v. Stamp*, *supra*; *Edge v. Strafford*, 1 C. & J. 391.

² *Harlow v. Lambie*, 132 Cal. 133. See *Smallwood v. Shepards*, 1895, 2 Q. B. 627. In Missouri, it is held that a written lease for a year may be modified by a parol agreement when such agreement is based upon a sufficient consideration. *Evers v. Shumaker*, 57 Mo. App. 454.

³ *Thomas v. Dremen*, 112 Ala. 670. See *Bonnewell v. Jenkins*, 8 L. R. Ch. Div. 74; § 82, *post*.

and that the specific performance of the agreement might be enforced in equity.^{1]}

§ 31. **Parol Licenses valid.** — Every grant of the possession of land for permanent use is an interest within the meaning of the Statute of Frauds, whether it be to enter at all times without fresh consent, or for a special purpose, as erecting and keeping a house in repair, or making an embankment or canal in order to raise water to work a mill, or the like ; and an agreement therefor must be in writing. But a license or authority to enter upon the land of another to do certain specified acts of a temporary character, without intent to pass an interest in the land, is founded in personal confidence ; and, although revocable so long as it remains unexecuted, it is valid, notwithstanding it is not in writing.² But the right to enter upon lands and to erect and maintain a dam so long as there shall be employment for the water-power thus created, is more than a license : it is the transfer of an interest in land in the nature of a lease, and must be in writing.³

§ 32. **Parol Agreements to lease, when enforced in Equity.** — Although a parol agreement to grant a lease may be void under the statute, it will still be enforced in equity when there has been a substantial part performance of it, though on the part of the plaintiff only ;⁴ and a specific performance will,

¹ *Cochrane v. Justice Mining Co.*, 16 Col. 415. It is held that a lease of real estate until such time as the lessor should pay the lessee a certain indebtedness is neither an agreement that by its terms is not to be performed within a year from the making thereof, nor an agreement for a leasing for a longer period than one year, and is not required to be in writing. *Raynor v. Drew*, 72 Cal. 307.

² *Cook v. Stearns*, 11 Mass. 533; *Phillips v. Thomson*, 1 Johns. Ch. 131; *Miller v. Auburn & Sy. R. R.*, 6 Hill, 61; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Woodward v. Parshley*, 7 N. H. 237; *Sampson v. Burnside*, 13 *id.* 264; *Dubois v. Kelley*, 10 Barb. 496.

³ *Mumford v. Whitney*, 15 Wend. 380. See *Wiggins Ferry Co. v. Ohio & Miss. R. R.*, 142 U. S. 396, as cited *ante*, § 21.

⁴ *Jackson v. Pierce*, 2 Johns. 221; *Hollis v. Whiting*, 1 Vern. 151; *Walker v. Walker*, 2 Atk. 98; *Beidelman v. Foulk*, 5 Watts, 308; *Walsh v. Colclough*, 9 U. S. App. 537; *Harman v. Harman*, 34 *id.* 437. A parol

under these circumstances, be decreed, if signed by one party only.¹ If possession has been delivered under such an agreement, it will be considered as a part performance;² especially if the tenant has expended money in building or improving the property, in pursuance of it.³ But acts which are merely introductory or ancillary to an agreement will not be considered as a part performance, although attended with expense.⁴ And possession must be delivered voluntarily in order to a part performance; for if the purchaser obtains possession wrongfully this will not avail him.⁵ Nor will a possession which can be referred to another title, distinct from the agreement, take a case out of the statute, and therefore no such possession by an occupant can be deemed a part performance.⁶

§ 33. **Substantial Performance, what. — Party's Representatives bound by Decree.** — The acceptance of a trifling earnest, or the payment of money on account of the agreement, although this may make a personal contract good, does not satisfy the statute when the contract concerns lands.⁷ Even the payment of a considerable sum of money, or the doing of

lease for more than one but less than three years, which by statute is required to be in writing, will be valid, if the lessee takes possession and pays rent according to the terms of the lease. *Grant v. Ramsey*, 7 Ohio St. 165; *Jones v. Peterman*, 3 S. & R. 543. See *Aylesford's Case*, 2 Stra. 783.

¹ *Owen v. Davis*, 1 Ves. Sr. 82; *Seton v. Slade*, 7 Ves. 265; *Martin v. Smith*, L. R. 9 Exch. 50; *Parker v. Taswell*, 2 De G. & J. 559; *Bonaparte v. Thayer*, 95 Md. 548. See §§ 46–49, *post*.

² *Moore v. Beasley*, 3 Ham. 294; *Butcher v. Stapely*, 1 Vern. 363; *Aston v. Aston*, 2 *id.* 452; *Bowers v. Cator*, 4 Ves. 91.

³ *Lester v. Foxcraft*, Colles, Parl. Ca. 108; *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. 243; *Carter v. Boehm*, 3 Burr. 1919. See *Foster v. Hale*, 3 Ves. 712. A parol agreement with a tenant from year to year, that if he sows wheat he may re-occupy the leased premises after the expiration of the tenancy for the purpose of harvesting the wheat, is enforceable, if founded upon a sufficient consideration. *Ladd v. Brown*, 94 Mich. 136.

⁴ *Clarke v. Wright*, 2 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412; *Cooke v. Toombs*, 2 Anst. 420; *Cooth v. Jackson*, 6 Ves. 12.

⁵ *Cole v. White*, 1 Bro. C. C. 409.

⁶ *Wills v. Strading*, 3 Ves. 378.

⁷ *Alsopp v. Patten*, 1 Vern. 472; *Coles v. Trecothick*, 9 Ves. 234.

sundry acts bearing upon the transaction, will not be a part performance of such a contract, unless such payment, or doing, clearly appear to have been solely with a view to the performance of the agreement.¹ And although an agreement may have been performed in part, yet if the court be not able to understand its terms the case will not be taken out of the statute.² But the mere circumstance that the terms do not clearly appear, or that the meaning of them is disputed, will not deter the court from ascertaining the real meaning of the contract, and enforcing it, when it can be made intelligible.³ And if the agreement is so far executed as to entitle either of the parties to require a specific performance, it will be binding on the legal representatives of the other party, in case of his death, to the same extent that the deceased party was bound by it.⁴

§ 34. *Livery of Seisin abolished. — Seal.* — The common law required that a freehold should be conveyed either by deed or by livery of seisin without writing. The English Statute of Frauds abolished the latter method, and left the former as the only mode of conveyance; and this provision of law, with some modifications, generally prevails in this country. The statutes of many of the States require the conveyance of all freeholds to be by deed; and in other States leases exceeding a certain number of years must also be by deed.⁵ And where the conveyance of a freehold is not, in terms, required by statute to be under seal, a seal has, unless where specially dispensed with by statute, been held necessary by the common law.⁶ For this reason, an agreement, not under seal, that a

¹ *Clinan v. Cook*, 1 Sch. & L. 22; *Butcher v. Butcher*, 9 Ves. 382; *Rosenthal v. Freeburger*, 26 Md. 80.

² *Forster v. Hale*, 3 Ves. 712.

³ *Mortimer v. Orchard*, 2 Ves. 243; *Boardman v. Mostyn*, 6 *id.* 470; *Allan v. Bower*, 3 Bro. C. C. 149.

⁴ *Shannon v. Bradstreet*, 1 Sch. & L. 52.

⁵ Thus in Massachusetts and Maryland seven years, in Virginia five, in Florida two, in Delaware, Rhode Island, and Vermont one year.

⁶ *Den v. Johnson*, 3 Green, N. J. 116, where it was contended that as by the Statute of Frauds all estates not in writing were at will, except certain short leases, all other transfers of interests in land, whether for

lessor should not turn out the tenant so long as he paid rent, has been held invalid; because the tenancy created by it would not be determinable so long as the tenant complied with the terms of his agreement, and would, therefore, operate as an estate for life, which, being a freehold, can pass only by deed.¹

§ 35. **Sufficient Signature under the Statute, what.** — As to what is sufficient signature to the agreement, it is unnecessary that the instrument should be signed contemporaneously with the making of the agreement; and anything under the hand of the party to be charged, which amounts to an acknowledgment that he has entered into the agreement, will satisfy the statute. As where one agreed verbally to take a lease for years, and when it was made out and sent to him for signature he returned it, and wrote on the back of the lease: "I hereby request you to endeavor to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for so doing this shall be a sufficient authority." This was held a recognition of an existing contract, reducing to writing so as to bind him.² But the fact

years or freehold, were by implication alike, and either freeholds were conveyable in writing or estates for years must be created by deed. But it was held that the statute was to be construed negatively and not affirmatively, and merely substituted written for verbal transfers of land where these were allowed at common law, but did not alter other established modes of conveyance. So *Allen v. Jaquish*, 21 Wend. 628. A lease for lives, to begin from the day of its date, with seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence in future. *Freeman v. West*, 2 Wils. 165.

¹ *Doe v. Browne*, 8 East, 165. By the statute, 8 & 9 Vict. c. 106, all leases required by law to be in writing must be made by deed; and the rule applies to assignments and surrenders of such leases. A demise of an incorporeal hereditament can only be valid by deed; a parol demise of a right of hunting and sporting, together with a messuage, is therefore void. *Bird v. Higginson*, 6 A. & E. 824. But an instrument not under seal by which land is demised, and which also attempts to demise incorporeal tenements, is not entirely void by reason of such an attempt. *Regina v. Hockworthy*, 7 A. & E. 492. It is held doubtful whether a lease under seal can be surrendered by a writing not under seal. *Roe v. Conway*, 74 N. Y. 201.

² *Shippey v. Derrison*, 5 Esp. 190; *Powell v. Dillon*, 2 Ball & B. 416.

that a party has altered the draft of a conveyance, and delivered it to any attorney to be engrossed, does not amount to signing it.¹ The statute is not complied with, unless the agreement is signed by the party, although it may have been written with his own hand ; because the absence of a signature is evidence that the party considered the instrument to be incomplete.² [Nor will the mere fact of the name of the party being written by him in the body of the instrument constitute a signature within the meaning of the statute.³ But where one wrote a lease containing his own name in the third person, recorded it, and entered upon the premises, and paid rent under the lease, these acts were held to show his intent to execute the lease, and to take the case out of the operation of the statute, without further signature.⁴] The signature may be written with a lead pencil, or in ink, at the discretion of the signer ; and if he is in the habit of printing instead of writing his name, he may be said to sign by his printed as well as by his written name if he intends it as his signature.⁵ And the name of the party may be affixed to an instrument by his direction, by the hand of another person, if it be done in his presence ;⁶ or by his broker or agent duly authorized.⁷ So if the agreement is not signed, but a letter has been written, acknowledging the agreement, this has been held sufficient to satisfy the statute.⁸ Unless the contract, in whatever shape, should be signed by both parties, it may be void for

¹ *Hawkins v. Holmes*, 1 P. Wms. 770 ; *Lowther v. Carill*, 1 Vern. 221.

² *Charlewood v. Bedford*, 1 Atk. 497 ; *Anderson v. Harold*, 10 Ohio, 399 ; *Bailey v. Ogden*, 3 Johns. 399.

³ *Stokes v. Moore*, 1 Cox, 219.

⁴ *Traylor v. Cabanné*, 8 Mo. App. 131.

⁵ Per *Ld. Eldon*, in 2 B. & P. 239 ; *Schneider v. Norris*, 2 M. & S. 286 ; *Clason v. Bailey*, 14 Johns. 484.

⁶ *Frost v. Deering*, 21 Me. 156 ; *Raymar v. Clarkson*, 1 Phillim. 422.

⁷ *Clason v. Bailey*, *supra*.

⁸ *Sanderson v. Jackson*, 2 B. & P. 238 ; *Allen v. Bennet*, 3 Taunt. 169 ; *Warner v. Willington*, 3 Drew. 523, 2 Jur. n. s. 433 ; *De Beil v. Thomson*, 3 Beav. 469. The letter may be sent to the plaintiff, or the acknowledgment may be contained in a letter sent to a third person. *Welford v. Beazeley*, 3 Atk. 503. And see *Dobell v. Hutchinson*, 3 Ad. & E. 355.

want of mutuality.¹ [But it seems that a lessee, by accepting a lease under seal and entering into the occupation of the premises, becomes liable for the performance of the conditions of the lease, although the same is not signed by him, and that the action against such a lessee for failure to perform the conditions of the lease would be *assumpsit*; for, as to him, it is not a sealed instrument.²]

§ 36. **Place of Signing.** — By the common law, the place of signing is immaterial; for if one writes his name in any part of the agreement, it will be considered his signature if it was written for the purpose of executing the instrument;³ as where a man drew an agreement in his own handwriting, beginning, “I, A. B., agree,” &c., and left a place for his signature, but did not sign it. Generally, when an agreement has been reduced to a certainty, and the statute has been substantially complied with, strict matters of form are not insisted on.⁴ So, it was held that the signing of an agreement in the place where a witness usually signs his name, by one who was acquainted with the contents of the instrument, was sufficient.⁵ But the Revised Statutes of New York required the name of the party to be *subscribed* or signed below, that is, at the foot of the memorandum; what, therefore, under the old statute was deemed to be a sufficient signing of an agreement was held not a compliance with the statute.⁶ It was doubted formerly

¹ *Cammeyer v. United Germ. Luth. Ch.*, 2 Sandf. Ch. 186, 249; *Miller v. Pelletier*, 4 Edw. 102; citing 10 Paige, 386; 26 Wend. 341. But in Michigan it seems that usage permits a lease to be executed by the exchange of duplicates, each of which is signed only by the other party. *Campbell v. Lafferty*, 43 Mich. 429.

² *First Cong. Meeting House Soc. v. Rochester*, 66 Vt. 501; *McFarlane v. Williams*, 107 Ill. 83.

³ *Penniman v. Hartshorn*, 13 Mass. 87; *Knight v. Crockford*, 1 Esp. 190. See also *Bluck v. Gompertz*, 7 Exch. 862; § 35, *ante*.

⁴ *Knight v. Crockford*; *Penniman v. Hartshorn*, *supra*. It is held that a lease made to a railroad, by name, is binding, although there be no corporation of that name, if it appear that, at the time of execution, the road was owned by a private person who operated it under the name employed in the lease. *Ecker v. C. B. & Q. R. R. Co.*, 8 Mo. App. 223.

⁵ *Welford v. Beazeley*, 3 Atk. 503.

⁶ *Davis v. Shields*, 26 Wend. 341.

whether an agreement could be enforced specifically against one who had signed it, it not having been signed by the party seeking performance ;¹ but it seems that, wherever there is a mutual obligation, this will be enforced in equity, or may be the foundation of an action at law.²

SECTION III.

OF AN AGREEMENT FOR A LEASE.

§ 37. **How distinguished from a Lease.** — It is sometimes difficult to distinguish a written instrument as importing an actual lease, or as amounting merely to an agreement to give one. This distinction is important, since it may happen that what was intended by one party to be merely an agreement for a lease may be construed into a present lease, passing an estate in the land, and the other party may thereby avoid covenants which would have been imposed upon him if a regular lease had been executed. The importance of the distinction to the lessee appears from the consideration that, on the execution of an actual lease, he acquires an interest, — an *interesse termini*, — which, upon entry, vests the term in him ; but, by an agreement merely, he acquires no legal interest in the term or in the land, nor can he defend in an action of ejectment. But an agreement will operate as a license to enter upon the premises agreed to be demised ; and if the intended landlord refuses to lease, the proposed tenant may file a bill in equity for a specific performance of the agreement, or maintain an action for damages, if any have resulted.³ In England it is provided that no lease in writing of any freehold, copyhold, or leasehold land shall be valid as a lease unless it be made by deed ; but that any agreement in writing to let shall be valid, and take effect as an agreement to execute

¹ Per Ld. Redesdale, in *Lawrenson v. Butler*, 1 Sch. & L. 18.

² *Allen v. Bennet*, 3 Taunt. 176 ; *Bourke v. Rothwell*, 2 Ball & B. 56 ; *Martin v. Mitchell*, 2 Jac. & Walk. 427 ; *Laythoarp v. Bryant*, 2 Bing. (N. C.) 735 ; *Clason v. Bailey*, 14 Johns. 484 ; *McCrea v. Purmort*, 16 Wend. 460 ; *Penniman v. Hartshorn*, *supra*.

³ *Price v. Williams*, 1 M. & W. 6.

a lease. Any person in possession of land in pursuance of an agreement to let, may, by the payment of rent or other circumstances, become a tenant from year to year.¹

§ 38. **Intention of the Parties governs the Construction.** — As the law stands, the question resolves itself into one of construction ; and an instrument will be considered a lease, or only an agreement for a lease, according to the paramount intention of the parties ; as such intent may be collected from the whole instrument.² And the law, it is said, will do violence to the words, rather than nullify the intent of the parties by construing them into a lease when the intent is manifestly otherwise.³ An express provision that an instrument is not to operate as a lease, but only as an agreement for one, shows clearly the intention of the parties, notwithstanding any inference which might be drawn from other clauses in the same instrument,⁴ but the mere use of the words “agree to let” is not of itself decisive.⁵ [On the other hand, an agreement containing words of bargain and sale *in præsenti* does not necessarily transfer the title, but may be merely an agreement to convey.⁶]

¹ Stat. 7 & 8 Vict. c. 76, § 4. Under this statute it has been held that, although the agreement not under seal did not operate as a demise, yet by a collateral contract to the intended demise, the lessee became bound for rent notwithstanding that he had never entered into possession. *Adams v. Hagger*, 4 Q. B. D. 480. Since the Judicature Acts it is no longer the rule that a person holding under an executory agreement for a lease is only made a tenant from year to year by paying rent, but he is to be treated as holding by the terms of the agreement. And such a tenant was held subject to the same right of distress as if a lease had been granted him. *Walsh v. Lonsdale*, 21 Ch. D. 9.

² *Goodtitle v. Way*, 1 T. R. 785 ; *Bacon v. Bowdoin*, 22 Pick. 401 ; *State v. Page*, 1 Spear, 408.

³ *Hallett v. Wylie*, 8 Johns. 44 ; *Jackson v. Clark*, *id.* 424 ; *Baxter v. Brown*, 2 W. Bl. 978.

⁴ *Perring v. Brooke*, 1 Mood. & R. 510.

⁵ *John v. Jenkins*, 8 Tyrw. 177 ; *Browne v. Warner*, 14 Ves. 156 ; *Weed v. Crocker*, 18 Gray, 219.

⁶ *Jackson v. Myers*, 8 Johns. 388 ; *Jackson v. Clark*, *id.* 424 ; *Ives v. Ives*, 18 *id.* 235 ; *Burnett v. Scribner*, 16 Barb. 621. And a contract reserving the right to quit at the end of ten years on paying the first instalment is a sale and not a lease. *Moulton v. Norton*, 5 Barb. 286.

§ 39. **Words to create a Leasehold Interest.** — Words of present demise, as *doth let, agrees to let, agrees to pay for, doth demise, shall enjoy*, or the like, will generally make an actual lease, if no future or more formal document appears to have been intended; and especially if possession is taken under it¹ [and the agreement leaves nothing incomplete²]. But the use of such words, however strong, will not constitute the instrument a lease, if it can clearly be inferred from the rest of the paper that the parties had it in contemplation to enter into a future lease.³ Thus an agreement containing words of present demise, but in which was inserted a stipulation on the part of the owner to make certain alterations and improvements, and of the other party to take a lease when the premises should have been so altered and improved, the term to commence from the day that the premises should be so altered and improved, was held to be only an agreement for a lease.⁴ So an instrument containing words of present demise, with an agreement that the lessee shall take possession immediately and that a lease shall be subsequently executed, operates only as an agreement for a lease.⁵ [A sealed instrument not speci-

¹ *Averill v. Taylor*, 8 N. Y. 44; *Baxter v. Brown*, 2 W. Bl. 973; *Wright v. Trevezant*, 3 C. & P. 441; *Doe v. Groves*, 15 East, 244; *Jenkins v. Eldridge*, 3 Story, 825; *Hand v. Hall*, 2 L. R. Exch. Div. 355; *Doe v. Benjamin*, 9 Ad. & E. 644.

² *Doe v. Ries*, 8 Bing. 178. The owner of land "agreed to rent and lease" it to a gas company, to store materials for the building they were about to erect on adjoining land, and at their request cleared his land of trees; it was held that this was a lease, and that possession was taken under it. *Kabley v. Worcester Gas Co.*, 102 Mass. 892; citing *Stanforth v. Fox*, 7 Bing. 590. Though an agreement contains a stipulation for a future lease, and no precise day is fixed from which rent is to commence, still if it contains words of present demise, and the party is let into possession, it operates as a lease. *Doe v. Ries*, 8 Bing. 178; *Pearce v. Cheslyn*, 4 Ad. & E. 225; *Chapman v. Bluck*, 4 Bing. (N. C.) 187.

³ *Jackson v. Moncrief*, 5 Wend. 26; *Tempest v. Rawling*, 13 East, 18. An instrument is not a demise, although it may contain the usual words of demise, if its contents show that such was not the intention of the parties. *Taylor v. Caldwell*, 3 B. & S. 826.

⁴ *Jackson v. Delacroix*, 2 Wend. 438; *Poole v. Bentley*, 12 East, 168; *Colley v. Streeton*, 2 B. & C. 878.

⁵ *Goodtitle v. Way*, 1 T. R. 75; *Morgan v. Bissell*, 8 Taunt. 65. Thus it was held to be an agreement in *McGrath v. Boston*, 103 Mass. 869,

fyng any term, but purporting to demise and lease from a future day, the lessee to pay taxes for a year and waive notice to quit, was held to be a lease for years.¹ An agreement of the purchaser of land to allow the vendor to remain in possession for a year, and until the former should pay a certain mortgage, which by its terms had four years to run, was held to be a lease and not a reservation, and it was held that the purchaser might pay, or tender the debt, within the year, and remove the vendor under the statute.² Where A. conveyed realty to B. by deed poll, reserving specified rents payable at stated times, and B. entered under the deed, it was held that, by entry, B. contracted to pay the rents as reserved, and that his contract, being implied and not express, was not within the Statute of Frauds, so that A. might maintain *assumpsit* for the rent due and unpaid.³ When the relation of the parties, between the execution of the agreement and the execution of the lease, cannot be any other than that of landlord and tenant, there is held to be a present demise.⁴]

§ 40. **Conditional Demise generally construed as an Agreement only.** — When the instrument makes the demise dependent on a condition or stipulation yet to be performed, it operates as an agreement only. Thus where a man agreed that another should “enjoy the mills,” and engaged to give him a lease for a certain time at a certain rent; and, by the same agreement, a piece of land was to be purchased by the grantor and included in the demise; it was held that this amounted only to

where repairs were to be done and a lease given; in *Griffin v. Knisely*, 75 Ill. 411, where the tenant was to receive a lease when his present holding ended; in *Brown v. N. Y. C. R. R.*, 44 N. Y. 79, where the covenants were not settled. The case of *Hand v. Hall*, 2 L. R. Exch. Div. 355, illustrates both propositions. Here A. “agreed to let” and B. “to take” premises “for one year from next Lady Day” by an instrument dated February 14, “with right at the end of the term for three and one-half years more on one month’s notice;” which was held to be a lease for the year, and an agreement for the further period.

¹ *Barney v. Keith*, 4 Wend. 502.

² *Hunt v. Comstock*, 15 Wend. 635.

³ *Providence Christian Union v. Elliott*, 18 R. I. 74.

⁴ *Curling v. Mills*, 6 M. & G. 173.

an agreement for a lease.¹ [And where a man agreed to repair a mill for another, for a certain sum, to be paid when the work was finished; and the latter agreed to secure the premises to the former until the price should be realized out of the profits, this was held to be not a lease but an agreement for a lease.²] An agreement in these words: "It is hereby agreed, by and between A. and B., that A. will let to B. the use of the county house in L.; and B. agrees to pay therefor the sum of \$750 annually, provided a majority of the county court will agree thereto," is only an agreement to lease on a precedent condition.³ So where the agreement was, that A. "shall hold and enjoy," and in a subsequent part of the agreement the grantor engaged to give A. a lease; it was held that, although the words "shall enjoy" might ordinarily constitute a present demise, yet that here they were so qualified by the subsequent engagement as to amount only to an agreement for a future lease.⁴ [Where the lessor agreed to give a further term of five years, to begin thirty days after his death, and to provide for this in his will, it was held an agreement only.⁵] A mere written authority given by one party to another to execute a lease to a third person, on terms previously offered in writing by such third person, is not in itself a lease.⁶

§ 41. But when Conditions are executed or Instrument so provides, may be a Lease. — But when the preliminary stipulations have been complied with⁷ or the instrument contains a

¹ Doe v. Ashburner, 5 T. R. 163; Dunk v. Hunter, 5 B. & A. 822; Clayton v. Burtenshaw, 5 B. & C. 41.

² People v. Gillis, 24 Wend. 201.

³ Buell v. Cook, 4 Conn. 288. So where security is first to be given by the tenant. McGauntan v. Wilbur, 1 Cow. 257.

⁴ Doe v. Ashburner, 5 T. R. 163; Colley v. Streeton, 2 B. & C. 273; Phillips v. Hartley, 8 C. & P. 121.

⁵ Weld v. Trip, 14 Gray, 380.

⁶ Davis v. Thompson, 1 Shep. 209.

⁷ Shaw v. Farnsworth, 108 Mass. 357. Here the tenant at will proposed to take a house for three years from a future day if the owner would put in a furnace, which the owner agreed to do, and did. Held a present demise, to commence *in futuro*. So Holley v. Young, 66 Me. 520; Bussman v. Ganster, 72 Pa. St. 285. And a written lease of a room in a

clause, to the effect that it shall be considered binding until a lease can be executed, it has generally been construed as a present lease. So the words, "A. hath, and by these presents doth demise," create a personal interest; and a subsequent agreement, to give a more formal lease contained in the same instrument, was held to be in the nature of a covenant for further assurance.¹ So where the words were: "A. agrees to let, and B. to take, for the term of sixty-one years; and, in consideration of a lease to be granted by A. for the said term, B. agrees to expend £2,000 in building, &c.; A. to grant a lease as soon as the houses are covered in; this agreement to be considered binding until one fully prepared can be procured;" this was held to be a lease, considering it to have been the intention of the parties that the tenant, who was to expend so much capital upon the premises, should have a present interest in the term, although, when a certain progress should be made in the building, a more formal lease was to be executed; and that the stipulation for a future lease did not, of itself, indicate an intention that the instrument should not operate as a present demise, but merely that a more formal instrument should thereafter be executed to effect the same thing.² And, generally, it may be said that, if there are words of present demise, without anything to indicate that the parties contemplate a further assurance, it is to be considered a lease.³

building in process of erection for a term certain "from the completion of said building" is a valid lease in *presenti* for a term to begin in *futuro*. *Hammond v. Barton*, 98 Wis. 188; *Colclough v. Carpless*, 89 *id.* 239. See § 89, *ante*.

¹ *Jackson v. Kisselbrack*, 10 Johns. 386; *Barry v. Nugent*, 5 T. R. 165; *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

² *Poole v. Bentley*, 12 East, 168; *Baxter v. Brown*, 2 W. Bl. 978; *Warman v. Faithfull*, 8 Nev. & M. 187; *Doe v. Groves*, 15 East, 244; *Pinero v. Judson*, 6 Bing. 206.

³ *Hallett v. Wylie*, 3 Johns. 44; *Thornton v. Payne*, 5 *id.* 74; *Mickie v. Lawrence*, 5 Rand. 571; and see *Averill v. Taylor*, 8 N. Y. 44. An agreement to build a wharf, which, when finished, is to be occupied by the grantee at a stipulated rent, accompanied by words of present demise, operates as a lease. *People v. Kelsey*, 14 Abb. Pr. 372.

§ 42. **To create Lease, Term and Rent must be certain.** — Certainly as to the time when the term is to commence, as well as to the period of its duration, and the amount of rent to be paid, is usually necessary to make an instrument operate as a present demise.¹ Thus where A. agreed “to let premises to B. on lease, with a purchasing clause, for twenty-one years, at £63 per year,” B. to enter at any time on or before a particular day, it was held to amount to an agreement only, since there were no words of present demise, the commencement of the tenancy was left uncertain, and the language showed that the letting was to be by a particular instrument, containing such a clause.² So, where no rent was fixed, but the amount thereof was left to the award of a third person not designated; an essential ingredient of a lease was said to be lacking.³ The courts will sometimes look at the contemporaneous acts of the parties, to assist in the construction of ambiguous words in the agreement.⁴ And strong circumstances of inconvenience attending a contrary construction may indicate the intention of the parties to be, that there shall be an agreement only; as where a forfeiture will be incurred;⁵ or there is a stipulation, that out of the rent a proportionate abatement shall be made, in respect of certain excepted premises, for until the appor-

¹ *Wright v. Trevezant*, 8 C. & P. 441; *Doe v. Ries*, 8 Bing. 178; *Warman v. Faithfull*, 3 Nev. & M. 137; *Dunk v. Hunter*, 5 B. & A. 322; *Clayton v. Burtenshaw*, 5 B. & C. 41; *John v. Jenkins*, 3 Tyrw. 170; *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Ries*, 8 Bing. 178; *Doe v. Benjamin*, 9 Ad. & E. 644; *Dailey v. Grimes*, 27 Md. 440. A lease of land containing iron ore, for five years and such further time as the lessee might require to remove all the ore, and providing that the lessee should pay a certain sum for each ton of ore removed, and should remove at least a certain fixed quantity per year, was considered sufficiently certain as to the duration of the term and the amount of rent. *Gilmore v. Ontario Iron Co.*, 22 Hun, 391. A writing: “Agreement. This is to certify that I have rented my farm for the year 1895 for the sum of \$300, payment to be stated in contract of the said D. (Signed) L. M.,” is a memorandum of a lease and not an executed lease. *Martin v. Davis*, 96 Iowa, 718.

² *Dunk v. Hunter*, 5 B. & A. 322.

³ *Haughery v. Lee*, 17 La. Ann. 22, and see *People v. Gillis*, 24 Wend. 201.

⁴ *Doe v. Ries*, 8 Bing. 181; *Chapman v. Bluck*, 4 Bing. (N. C.) 195.

⁵ *Fenny v. Child*, 2 M. & S. 255.

tionment is made, the lessor cannot distrain; or there is a stipulation, that the tenant shall hold under all the usual covenants, for what are usual covenants may be disputed.¹ But, notwithstanding such a clause, the instrument may still be so certain as to be a lease.²

§ 43. **Actual Transfer of Possession creates Lease.** — It is manifest, therefore, that if an instrument, in form an agreement for a lease, is in itself an actual transfer of possession, whether immediate or *in futuro*, it is a lease, although it contains a stipulation for executing a subsequent lease. But if the words do not import immediate possession, or if some act is to be done prior to the entry of the tenant, an inference arises that the instrument was not intended as a lease but only as an executory contract. But if the intention of the parties to create a lease is sufficiently explicit, the instrument will take effect as such, whether the words run in the form of a license, a covenant, or an agreement.³

§ 44. **Agreement must be explicit. — Collateral Matter.** — It is desirable that an agreement for a lease should contain a minute of all the proposed covenants and conditions, in order to avoid disputes thereafter. Thus, if it is intended that the tenant shall pay taxes or assessments, rebuild in case of fire, or keep the premises insured, or that he shall not underlet or assign without the landlord's consent; it should be stipulated in the agreement that such covenants shall be contained in the lease. No verbal explanations or stipulations will be permitted to vary an agreement in writing; and negotiations between parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be reconsidered.⁴ [Thus, extrinsic evidence is generally inadmissible

¹ *Morgan v. Bissell*, 3 Taunt. 65; *Tempest v. Rawling*, 13 East, 18; *Doe v. Powell*, 8 Scott, N. R. 687, 700.

² *Doe v. Benjamin*, 9 Ad. & E. 644; *Alderman v. Neate*, 4 M. & W. 704.

³ *Wilkinson v. Hall*, 3 Bing. (N. C.) 508; *Curling v. Mills*, 6 M. & G. 173; *Wilcox v. Bostwick*, 57 S. C. 151.

⁴ *Pattison v. Hull*, 9 Cow. 747; *Broadwell v. Getman*, 2 Den. 87; *Renard v. Sampson*, 12 N. Y. 561; *Sourwine v. Truscott*, 17 Hun, 432.

to show that the lessor at the time of executing a written lease, promised to repair;¹ or to supply deficiencies in the furniture of the leased premises.²] But distinct and separable provisions, whether contemporaneous with or prior to the execution of a deed or written lease, will not be merged therein if clearly collateral.³ If an agreement is silent as to what covenants are to be contained in the lease, and expresses only that it is to contain the usual covenants, it means only such as are independent of positive stipulation, being incident to the nature of the contract and therefore to be presumed to have been within the contemplation of both parties in order to secure the full effect of the agreement. These words, however, are quite immaterial; for, in every agreement of this character, it is implied that there shall be usual and proper covenants.⁴

§ 45. **Usual Covenants.** — What are to be considered usual covenants will depend upon circumstances; as upon the custom or usage in the section of country where the premises are situated, or upon the nature of the property itself; and the question seems properly to be one of fact and not of law.⁵

¹ *Cleves v. Willoughby*, 7 Hill, 83; *Kabus v. Frost*, 50 N. Y. S. C. 72. But see *Caulk v. Everly*, 6 Wharton, 303 (in equity).

² *Wilson v. Deen*, 74 N. Y. 531. See *Van Eps v. Mayor*, 12 Johns. 436; *Ketchum v. Evertson*, 13 *id.* 359; *Fuller v. Hubbard*, 6 Cow. 13; *H. & N. Y. St. Co. v. Mayor*, 6 N. Y. W. R. 134.

³ *Witbeck v. Waine*, 16 N. Y. 582. Thus an agreement to kill down the game, made at the time of, but not incorporated in, a farming lease, although this reserved a right to keep up and hunt game. *Erskine v. Adeane*, L. R. 8 Ch. 756; *Morgan v. Griffith*, L. R. 6 Ex. 71. So where there was a distinct collateral oral agreement preceding the lease that certain fixtures should remain for the tenant's benefit. *Lewis v. Seabury*, 74 N. Y. 409. So an agreement by landlord to put in a water-closet. *Munn v. Nunn*, 43 L. J. (N. S.) C. P. 241.

⁴ *Wilkins v. Fry*, 1 Mer. 263; *Gerrard v. Grinling*, 2 Swanst. 249. A contract for a lease, though in one case held to embrace a covenant not to underlet or assign, *Folkingham v. Croft*, 3 Anst. 700, received a different construction, *Church v. Brown*, 15 Ves. 264, 271; *Henderson v. Hayward*, 3 Bro. C. C. 632; while in other cases it has been considered a subject for inquiry. *Jones v. Jones*, 12 Ves. 190; *Boardman v. Mostyn*, 6 *id.* 471.

⁵ *Bennett v. Womack*, 3 C. & P. 96, 98. This is so where the parties have stipulated for the "usual covenants;" but it is held to be a question of law where the contract for lease is silent.

Accordingly it has been held that a lessor could not, as a matter of right, demand a covenant of the lessee not to assign or underlet without license;¹ or not to carry on a particular trade or business on the premises;² or to keep them insured, or to pay land and other permanent taxes.³ Nor on the other hand is it usual for a lessor to covenant to rebuild the demised premises in case of fire, with a stipulation that the rent shall cease on his failure to do so.⁴ But a covenant for the lessee's quiet enjoyment, without interruption by the lessor, or by persons claiming under him, is usual in all cases, and is in fact incidental to every lease.

§ 46. **Damages for Breach of Agreement. — Equitable Relief. —** The mere signing of an agreement does not, as we have seen, establish the relation of landlord and tenant, although it may create a right of action for damages for a breach of the contract, or for a specific performance of it. And, although an agreement between an intended lessor and lessee may amount to a present demise, yet if, upon the face of it, the expression of further particulars appears to be necessary to carry the intention of the parties into execution, equity will decree a specific performance of the agreement in that particular.⁵

¹ Church v. Brown, 15 Ves. 258; Henderson v. Hay, 3 Bro. C. C. 632; Hodgkins v. Crowe, L. R. 10 Ch. 622; Hampshire v. Wickens, 7 L. R. Ch. Div. 555; overruling Haines v. Burnett, 27 Beav. 500.

² Van v. Corpe, 3 Myl. & K. 269; Propert v. Parker, *id.* 280-282.

³ Bennett v. Womack, 7 B. & C. 627; s. c. 3 C. & P. 96. The agreement here was that tenant was to pay a *net* rent, and this was held to imply all taxes; but it was decided that otherwise the tenant would not have been bound for the land tax or sewer rate. In Hampshire v. Wickens, *supra*, it is considered that the usual tenants' covenants are: (1) to pay rent; (2) to pay taxes, except those expressly made payable by landlord; (3) to keep and deliver up in repair; (4) to permit the landlord to enter and view the repairs.

⁴ Doe v. Sandham, 1 T. R. 705; Medwin v. Sandham, 3 Swanst. 685. Under an agreement for a lease to contain all usual and necessary covenants, and particularly a covenant to keep the mill in good tenantable repair, it was held that a lessee is not entitled to have introduced into the covenant the words *damages by fire or tempest only excepted*. Sharp v. Milligan, 23 Beav. 419.

⁵ Fenner v. Hepburn, 2 Y. & C. 159. Parol terms of agreement for a lease, drafted by mutual consent by lessee, were received by lessor with-

But the terms and conditions of the intended lease must either be actually expressed, or fairly to be inferred; for, if any material portion of the terms be omitted or left in doubt, [as if the duration of the term is not specified,¹ or the instrument wants a definite description of the demised premises²] the transaction will be regarded as imperfect and as resting in treaty only.³ And where a tenant in possession proposed to pay an increased rent, a bill for a specific performance of the proposal was dismissed because the period when the increased rent should commence was not agreed upon; and a similar rule has been applied in other cases, where the terms of the proposed lease were not stated.⁴ But where an agreement, uncertain in itself, refers to another written instrument for or to a particular plan, as forming part of the contract, parol evidence may be admissible to identify the writing or plan.⁵

out objection, and lessee was let into possession. Held, that there had been such part performance as to prevent the lessor from setting up the Statute of Frauds. *Cain v. Coombs*, 1 De G. & J. 34; and see *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. But the fact that a tenant was in possession when a parol agreement for future letting was made, and made certain improvements in consideration of the expected lease, is held not to create a sufficient equity to take the case out of the operation of the statute. *Whiting v. Pittsburg Opera House Co.*, 88 Pa. St. 100.

¹ *Myers v. Forbes*, 24 Md. 593.

² *Lancaster v. De Trafford*, 31 L. J. Ch. 554; *Davis v. Shepherd*, L. R. 1 Ch. 410. See § 160, *post*.

³ *Gordon v. Trevelyan*, 1 Price, 64; *Verlander v. Codd*, 1 Turn. & R. 352; 1 Younge & C. 82, 441. Thus an agreement to take a lease of a house if it shall be put in thorough repair, and the drawing-rooms handsomely decorated according to the present style, was held to be too uncertain for the court to enforce. *Taylor v. Partington*, 7 De G., M. & G. 328.

⁴ *Lord Ormond v. Anderson*, 2 Ball & B. 363; *Clinan v. Cooke*, 1 Sch. & L. 22; *O'Herlihy v. Hedges*, *id.* 128.

⁵ *Hodges v. Horsfall*, 1 Russ. & M. 116; *Clinan v. Cooke*, 1 Sch. & L. 33. Where a landlord agreed to grant leases of plots of ground, as houses upon each of them should be built to a certain stage, when the assignee of the builders' interest had completed houses upon some of these plots, he was held to be entitled to leases of those plots, although he disclaimed all interest in the remaining plots. *Wilkinson v. Clements*, L. R. 8 Ch. 96.

§ 47. **Remedy at Law. — Specific Performance.** — Upon the breach of an agreement to give a lease, the plaintiff may recover, in an action at law, the damages and expenses incurred by him in preparing to remove to and occupy the premises, together with the difference between the real value of the lease and the contract price¹ [but not profits merely anticipated²]. But, in seeking specific performance, he must not only make it appear that he is endeavoring to enforce a fair and reasonable contract, but must also show that his own conduct, in reference to it, has been fair, and free from suspicion; for, if there be a reasonable doubt thrown upon the transaction in either respect, he will be left to his legal remedy for the non-performance of the contract.³ [The remedy by specific performance is discretionary. The question is not, what must the court do, but what in view of all the circumstances of the case should it do, to further justice. When a contract has been fairly procured, and its enforcement will work no injustice or hardship, it is enforced almost as of course; but if it has been procured by fraud or falsehood, or if its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid.⁴ And the plaintiff must perform on his own part the conditions prescribed as to be performed by him in the agreement.⁵] So, if one of the parties acts to the prejudice of the other party, as if he abandons his contract to take a lease, his bill for specific performance will be dismissed.⁶ Nor will an agreement to grant a lease be enforced in favor of a tenant where evidence is adduced of his having been guilty of fraud or felony; or on proof of his insolvency,

¹ *Ward v. Smith*, 11 Price, 19; *Driggs v. Dwight*, 17 Wend. 71.

² *Giles v. O'Toole*, 4 Barb. 261. See § 317, *post*.

³ *Flood v. Finlay*, 2 Ball & B. 16; *O'Rourke v. Percival*, *id.* 58; *Harris v. Kemble*, 1 Sim. 111.

⁴ *Plummer v. Keppler*, 26 N. J. Eq. 481; *Miss. R. R. Co. v. Cromwell*, 91 U. S. 648; *Fish v. Leser*, 69 Ill. 394. On an agreement for lease by two defendants; one of the defendants being an infant, the plaintiff was held not to be entitled to specific performance against both of them; nor against one as to his interest in the absence of any proof of misrepresentation or misconduct on his part. *Lumley v. Ravenscroft*, 1895, 1 Q. B. 688.

⁵ *Williams v. Briscoe*, 22 Ch. D. 441.

⁶ *Garrett v. Besborough*, 2 Dru. & Walsh, 441.

or of a commission of waste ; or that there was a want of good husbandry on his part, whilst holding under the agreement for a lease.¹ [Equity will not compel specific performance of a lessee's agreement with a third party to assign a lease in which he has covenanted with the lessor not to assign without license ; since, as the third party seeking relief must treat the lease as existing, he must take it with the covenant against assignment as in force.²]

§ 48. **Agreement to lease, when enforced in Equity.**—The court will not compel the acceptance of a lease, unless the party seeking performance is able to perform the contract on his part, by granting a secure lease for the term agreed upon ; and an offer, on the part of the lessor, of pecuniary compensation in case of eviction, will not alter the case, because such indemnity cannot extend to the specific object of the contract which is the possession and occupation of the premises.³ But where a man contracts to grant a lease of an estate when he is entitled to only a portion of it, the contract may be enforced by the proposed lessee, as to that part of which the grantor is owner.⁴ An agreement, however, by a person out of possession, to grant a present lease to a party who has knowledge that he cannot obtain possession of it except by suit, will not be enforced ; for this becomes a contract for a lawsuit which is not a lawful subject of contract, and is not therefore a valid agreement for a lease.⁵ But a person who has contracted for the lease of a mine cannot resist performance, merely on the ground of his ignorance of mining matters, and that the mine turns out to be worthless.⁶

¹ *Willingham v. Joyce*, 3 Ves. 168; *Brooke v. Hewitt*, *id.* 253; *Buckland v. Hall*, 8 *id.* 92; *Featherstonhaugh v. Fenwick*, 17 *id.* 313; *Pearson v. Knapp*, 1 Myl. & K. 312; *Hill v. Barclay*, 18 Ves. 63. But the insolvency must be general; one instance of non-payment of rent will not suffice. *Neale v. McKenzie*, 1 Keen, 474.

² *Willmott v. Barber*, 15 Ch. D. 96.

³ *Fildes v. Hooker*, 2 Mer. 424.

⁴ *O'Rourke v. Percival*, 2 Ball & B. 64.

⁵ *Bayly v. Tyrrell*, 2 Ball & B. 358. So where tenant may be subjected to lawsuit: *Pegler v. White*, 33 Beav. 403; or to excessive expense to repair: *Tildesley v. Clarkson*, 30 *id.* 419.

⁶ *Haywood v. Cape*, 25 Beav. 140. It has been held that one who has

§ 49. **Agreement must be in Writing unless confessed or partly performed.**— As a general rule, also, the specific performance of an agreement for a lease will be ordered only when it is in writing, and conforms to the statute in all other respects; but it may be decreed, although not in writing, if it is fully set forth in the bill and confessed by the answer;¹ or if it has been partly carried into execution by the performance of such acts as appear to have been done with a view to the agreement being fully performed; or under such circumstances as would manifestly operate as a fraud upon the other party unless the agreement should be so performed.² [So where the proposed lessee had entered, ostensibly as under the lease, and had paid rent, and the lessor, relying upon the lessee's good faith, had made improvements on the premises, a decree was made that the lease be executed by the tenant.³] And in all cases, a plaintiff is expected to exercise due diligence in enforcing his claim; for the application, being addressed to the discretion of the court, will not be entertained in favor of one who has long slept on his rights or acquiesced in an adverse title and possession.⁴ And whether the laches consisted in not prosecuting, or in not commencing a suit, is immaterial. But the doctrine of laches does not apply to a contract in part executed, by the party's having been in the enjoyment of the benefits given him by the contract.⁵

agreed to convey land to a railroad company for a right of way, and has let the company into possession, may enforce the covenants of the agreement as to the payment of the purchase-money, the preservation of a spring, and the building of a crossing, by an action of ejectment. *Daubert v. Penn. R. R.*, 155 Pa. 178.

¹ *Att'y-General v. Sitwell*, 1 Younge & C. 583.

² §§ 32, 33, *ante*; *Nunn v. Fabian*, L. R. 1 Ch. 35; where payment by the tenant of one quarter's rent, at the new rate, took a verbal contract for a further lease for twenty-one years out of the statute.

³ *Seaman v. Aschermann*, 51 Wis. 678, 57 Wis. 547.

⁴ *Moore v. Blake*, 1 Ball & B. 62; *Hudson v. Bartram*, 3 Madd. 440; *Hertford v. Boore*, 5 Ves. 720; *Mix v. Baldue*, 78 Ill. 215; *Peck v. Brighton Co.*, 69 *id.* 200; *McDermid v. McGregor*, 21 Minn. 111.

⁵ *Clarke v. Moore*, 1 Jones & Lat. 723. If a person has agreed to execute a lease, or other deed by a certain day, he is not in default until the proposed lessee has demanded it. In England the party entitled to a deed is bound to have it drawn, and presented for execution; but, in the

United States, the party who is to give the deed should have it drawn at his expense, execute it, and hold it ready for delivery when called for, although the lessee may prepare the deed, and tender it for execution. *Carpenter v. Brown*, 6 Barb. 149, overruling *Connelly v. Pierce*, 7 Wend. 129; *Fuller v. Hubbard*, 6 Cow. 1. But a deed is not complete, nor is the grantee bound to accept it, unless it is in a condition to be recorded. *Smith v. Smeltzer*, 1 Hilt. 287.

CHAPTER II.

OF THE DIFFERENT SPECIES OF TENANCY.

SECTION I.

TENANCY IN FEE OR FOR LIFE.

§ 50. Fee may be created in Form of Lease. — Lands and tenements may be granted in fee by a deed in which rent is reserved or covenanted to be paid.¹ Sometimes other covenants are inserted with conditions to enforce the grantee's performance. But such instruments are more properly conveyances than leases, creating no tenure, and having little else in common with the latter class of instruments than the reservation or charge of a rent, with the covenant or condition that secures, and the remedies by action, entry, or distress that enforce, the grantee's payment thereof. [In order to convey a fee, the demise must (except in those jurisdictions where, by statute, such words are unnecessary to convey a fee²) contain words of inheritance. Thus it was held that a lease of land without words of inheritance, reserving rent payable semiannually with a perpetual right of renewal in the tenant at the end of each hundred years on condition that the rent payable on such renewals shall equal to a certain percentage of the value of the land and never less than that named in the lease, reserved to the lessor an estate in fee; and this under a statute³ providing that "when land is demised for the term of one hundred years or more, the term shall, so long as

¹ *Saunders v. Hayes*, 44 N. Y. 79, and see *Watterson v. Reynolds*, 95 Pa. St. 474.

² As in New York, 1 R. S. 748, § 1.

³ Pub. Sts. Mass. c. 121, § 1.

fifty years thereof remains unexpired, be regarded as an estate in fee simple as to everything concerning the descent and devise thereof.”¹]

§ 51. **Tenancies for Years and for Life distinguished.**—We have already noticed a material difference between leases for years and leases for a life or lives, in that the latter convey a freehold, while the former, without respect to their possible periods of duration, convey no more than a mere chattel interest.² More important distinctions are, that an estate for life cannot be made to commence *in futuro*, nor can it be created merely by parol.

§ 52. **Life Estate, how created.**—An estate for life may be created either by express limitation or by a grant in general terms. If made to a man for the term of his own life, or for that of another person, he is called a tenant for life. But the estate may also be created by a general grant, without defining any specific interest; as where a grant is made to a man, or to a man and his assigns without any limitation in point of time, it will be considered as an estate for life, and for the life of the grantee only.³ A grant may also be made to one or more persons, to endure for their joint lives, or the life of the survivor, as well as for the life of a stranger. And when it is intended that a lease to two or more persons shall determine on the life of either, the grant should be stated to be for and during their joint lives. If the interest is to con-

¹ *Stark v. Mansfield*, 178 Mass. 76. For cases in which the lease contained words of inheritance and so was construed to convey a fee, see *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159; *Stephenson v. Haines*, 16 Ohio St. 478; *Robb v. Beaver*, 8 W. & S. 107. A deed, with words of inheritance and the ordinary covenant of seisin, given by a tenant whose lease does not contain words of inheritance, does not disseise the lessor, but conveys only the tenant's interest under the lease. *Stark v. Mansfield*, *supra*. See *Hollenbeck v. McDonald*, 112 Mass. 247; *Williams v. Woodward*, 2 Wend. 487; *Bloomer v. Waldron*, 3 Hill, 361; §§ 261, 284, 285, 370, 440, *post*.

² §§ 14, 14 *a*, *ante*; *Flannery v. Rohmayer*, 49 Conn. 27; *Faler v. McRae*, 56 Miss. 227.

³ Co. Lit. 42, *a*; *Jackson v. Embler*, 14 Johns. 198; *Clearwater v. Rose*, 1 Blackf. 187; *Gray v. Parker*, 4 W. & S. 17. See § 50, *ante*.

tinue to the survivor, it is sufficient to grant it generally for their lives, without inserting words of survivorship; and on the death of either, the entire estate will survive to the other. But if the lease be granted for a certain term of years, if the lessees shall so long live, the interest will determine with the death of one.

§ 53. **Without Limitation in Time, Estate is for Life.** — Where a grant is made, subject to be defeated by a particular event, and there is no limitation in point of time, it will be *ab initio* a grant of an estate for life, as much as if no such event had been contemplated. Thus, if a grant be made to a man so long as he shall inhabit a certain place, or to a woman during her widowhood; as there is no certainty that the estate will be terminated by the change of habitation or by the marriage, respectively, of the lessees, the estate is as much an estate for life, until the prescribed event takes place, as if it had been so granted in express terms.¹ [And the rule was applied where the term was to last so long as the lessor should use the premises for the purpose of carrying on a certain manufacture.²] And where the plaintiff agreed to pay the defendant one hundred pounds per annum during the defendant's life, for which the plaintiff was to have the defendant's land and negroes, the court held it to be substantially a lease for the life of the defendant.³ Estates for life are frequently created by will for the purpose of providing a maintenance for some of the testator's family. And whenever a devise of land is made without words of inheritance or their equivalent, the devisee takes only a life-estate.⁴

¹ Co. Lit. 42, a; Com. Landl. & T. 4.

² Warner v. Tanner, 38 Ohio St. 118. But see Gilmore v. Hamilton, 83 Ind. 196. An estate for life, even if determinable when the rents shall have paid a debt to the lessee, is a freehold, which cannot be created without deed. People v. Gillis, 24 Wend. 201.

³ Mickie v. Ex'rs of Wood, 5 Rand. 574; Newton v. Wilson, 3 Hen. & M. 470; Maverick v. Lewis, 3 McCord, 211.

⁴ Jackson v. Embler, 14 Johns. 198; Witherspoon v. Dunlap, 1 McCord, 546; Gray v. Parker, 4 W. & S. 17; § 50, ante.

SECTION II.

LEASES FOR YEARS, AND FROM YEAR TO YEAR.

§ 54. **How created.**—Leases may be granted, in express terms, for one or more years, or for any part of a year; and, in either case, the lessee will be treated as a tenant for years, and is usually so called. The ordinary mode of leasing is for a specified term of years; but if no particular period of time is limited for its duration, a tenancy from year to year will arise.¹ This species of letting, where no certain time is mentioned, according to the strictness of the ancient law, continued during the pleasure of the parties, and might be put an end to at any time, by either party; the lessee being in fact a mere tenant at will. But it was determined early that estates at will were at the will of both parties, and that neither of them was to be permitted to exercise his pleasure contrary to equity and good faith. The lessor could not terminate the estate after the tenant had sown and before he had reaped a crop, so as to prevent his necessary egress and regress to take away the emblements;² nor could the tenant, before the usual time for the payment of rent had arrived, determine the estate so as to deprive the landlord of the rent which would accrue at that time.³ [The rule that the reservation of an

¹ The rule may be modified by statute, as in Washington, where Bal. Code, § 4569, provides that “when premises are rented for an indefinite time, with monthly . . . rent reserved, such tenancy shall be construed to be a tenancy from month to month.” *Schreiner v. Stanton*, 26 Wash. 563. To the general rule, see *New Sharon Water Power Co. v. Fletcher*, 88 Me. 571; *Indianapolis, &c. Co. v. First Nat. Bk.*, 134 Ind. 127; *Swope v. Hopkins*, 119 *id.* 125; *Mason v. Wierengo*, 113 Mich. 151; *Coudert v. Cohn*, 118 N. Y. 309; *Teifenbrun v. Teifenbrun*, 65 Mo. App. 253; *Pacific Express Co. v. Tyler, &c. Co.*, 72 *id.* 151, where the Missouri statutes and cases are discussed. The fact that the tenant does not intend to renew, is immaterial. *Mason v. Wierengo*, *supra*. A lease for “one or more years” constitutes a term for two years, at the option of the lessee. *Boston Clothing Co. v. Solberg*, 28 Wash. 262.

² *Jackson v. Bradt*, 2 Caines Cas. 169; *Ellis v. Paige*, 2 Pick. 71, n.

³ *Sullivan v. Enders*, 3 Dana, 66; *Kightly v. Bulkley*, 1 Sid. 338. A tenant at will cannot put an end to his tenancy, even by an assignment without giving notice to his landlord. *Pinhorn v. Souster*, 8 Exch. 763.

annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year¹ is not applicable to a parol tenancy void under the Statute of Frauds, where the entire rent has been paid in advance.²]

§ 55. **Arise from General Occupation.** — Since the time of the Year Books, however, the courts have treated a general occupation by permission, no time being fixed for its continuance, as a tenancy from year to year, whenever the reservation of rent or other circumstances indicated an agreement for an annual holding³ [and whether the holding over the

¹ *Jackson v. Bradt*, 2 Caines, 169; *Rich v. Bolton*, 46 Vt. 84.

² *Brant v. Vincent*, 100 Mich. 426. See § 55.

³ *Jackson v. Wilsey*, 9 Johns. 267; *Craske v. Christ Un. Pub. Co.*, 17 Hun, 319; *Lesley v. Randolph*, 4 Rawle, 123; *Thomas v. Wright*, 9 S. & R. 87; *Hey v. McGrath*, 81 * Pa. St. 310; *Roe v. Lees*, 2 W. Bl. 1171; *Richardson v. Langridge*, 4 Taunt. 128, 131. By R. S. Ind. 1876, p. 338, § 2, R. S. 1881, §§ 5208, 5209, all general tenancies in which the premises are occupied by the express or constructive consent of the landlord are to be deemed tenancies from year to year. See *Tolle v. Orth*, 75 Ind. 298. In *Cattley v. Arnold*, 1 Johns. & H. 651, 656, it is said, "As early as the reign of Hen. VIII., on any holding on which annual rent is reserved, the tenant is entitled to one half year's notice to quit." It is often stated that tenancies from year to year have been implied from the earliest times, whenever there was a general holding, without regard to annual rent or other circumstances pointing to a yearly tenancy. 4 Kent, Com. 113; *Parker v. Constable*, 3 Wils. 25; *Jackson v. Bryan*, 1 Johns. 322; *Wilmot, J.*, in *Timmins v. Rawlinson*, 3 Burr. 1609; *Ellis v. Paige*, 2 Pick. 71, n.; *Doe v. Watta*, 7 T. R. 85; and see *Leavitt v. Leavitt*, 47 N. H. 329. But such a proposition is not borne out by authority. Formerly, all parol tenancies were at the will of the lessor, even though expressed as for years or from year to year: *Smith, L. & T.* 8; 14 Hen. VIII. 13; and were only after a struggle held at the will of both parties: *Litt.* § 68; *Co. Litt.* 55, a; *Keilw.* 65, pl. 6; *id.* 162, pl. 4; 13 Hen. VIII. 16 pl. 1; 14 *id.* 13. A regard for the tenant's right to emblements also allowed him to enter and take the crop, or even to remain until it was fit for removal. 35 Hen. VI. 24, pl. 30; 13 Hen. VIII. 16 pl. 1; *Kightly v. Bulkley*, 1 Sid. 339. But this was only in farming tenancies: 14 Hen. VIII. c. 13; *Smith, L. & T.* 20; and formed only one element in establishing a holding from year to year. *Ibid.*, and see *Leavitt v. Leavitt*, 47 N. H. 340. And it will be found that in all these cases there was either an express parol demise from year to year, or rent paid in reference to such a period. Since the Statute of Frauds, the authorities have been clear in requiring an annual holding or rent. *Roe v. Lees*, 2 W. Bl. 1171; *Richardson v. Lang-*

term, or the payment of rent, is with the intent to continue the tenancy from year to year, is a question of fact¹]. A tenancy is not determinable at the end of any current year, unless a proper notice to quit shall have been previously served by the party intending to dissolve the tenancy upon the other;² in default of which the tenancy will run on from year to year, until some event happens which, in contemplation of law, destroys it.³ And this rule applies to the tenant

ridge, 4 Taunt. 128; *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Doe v. Wood*, 14 *id.* 682, 686; and is the settled law in England. *Cattley v. Arnold*, 1 Johns. & H. 651, 656; *Smith v. Soden*, L. & T. 48-52, and cases cited. See § 56, *post*. Of the cases apparently *contra*; in *Timmins v. Rawlinson*, and *Doe v. Watts*, there was an express annual demise and rent paid or reserved. *Jackson v. Bryan* is inconsistent with *Jackson v. Bradt*, 2 Caines, 169; and *Bradley v. Covell*, 4 Cow. 350. In *Jackson v. Miller*, 7 Cow. 747, the case was between vendor and vendee. In *Den v. M'Kay*, 1 Penningt. 420, the occupant for years was held only entitled to "some notice." In *Leavitt v. Leavitt*, 47 N. H. 340, the oral demise was not general, but for life; and in the case cited in *Putnam v. Page*, 2 Pick. 71, n., the demise was referable to a yearly holding or the decision turned on the right to emblements. See *Rich v. Bolton*, 46 Vt. 84; *Williams v. Deriar*, 31 Mo. 13; *Jones v. Willis*, 8 Jones (N. C.), 430; *Johnson v. Johnson*, 13 R. I. 467. In Massachusetts and Maine, tenancies from year to year are unknown. *Ellis v. Paige*, 1 Pick. 43; *Withers v. Larrabee*, 48 Me. 570.

¹ *Jones v. Shears*, 4 Ad. & E. 832; *Doe v. Crago*, 6 C. B. 90; *Skaggs v. Elkus*, 45 Cal. 154; *Gray v. Bompas*, 11 C. B. n. s. 520; *Montgomery v. Willis*, 45 Neb. 434. A tenancy from year to year cannot be determined so as to bar the interest of the tenant's creditors, unless there is either a legal notice to quit, or a surrender in writing. *Doe v. Ridout*, 5 Taunt. 519.

² The right to determine such a tenancy is an inseparable incident thereof; and will even control an express provision that the tenancy is to continue as long as rent is paid, without disturbance from the lessor. *Doe v. Browne*, 8 East, 165; *Holmes v. Day*, 8 Ir. R. C. L. 235; *West Tr. Co. v. Lansing*, 49 N. Y. 499. And a surety of lessee may avail himself of this right. *Pleasanton's Appeal*, 75 Pa. St. 344.

³ *Right v. Darby*, 1 T. R. 159; *Clayton v. Blakey*, 8 *id.* 3; *Witt v. New York*, 5 Rob. (N. Y.) 248. A tenancy from year to year is not to be considered as a continuous tenancy, but as recommencing every year. *Gandy v. Jubber*, 5 B. & S. 78. In *Oxley v. James*, 13 M. & W. 214, Parke, B., says, "The nature of an estate from year to year" is "a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and parcel of it;" and "conse-

as well as to the landlord. Even if the tenant surrenders the premises to an under-tenant, the landlord may still look to him for the rent of that year, unless he has accepted the incoming tenant and received rent from him.¹

§ 56. **Arise from Void Parol Demises for Years.** — The implied tenancy, from year to year, will arise when the occupation is under a parol demise for years void because within the Statute of Frauds.² So, where a tenant for years holds over and pays rent, he is impliedly bound by the terms of his former tenancy.³ [And if the rent be reduced and possession quently the moment any new year begins, the tenant has a right to hold to the end of that year." *Cattley v. Arnold*, 1 Johns. & H. 651. For applications of the general rule see *Phoenixville Borough v. Waters*, 147 Pa. 501; *Harvey v. Gunzberg*, 148 *id.* 294; *Belding v. Texas Produce Co.*, 61 Ark. 377; *Critchfield v. Remaley*, 21 Neb. 178; *Montgomery v. Willis*, 45 *id.* 434; *Grizzard v. Roberts*, 110 Ga. 46; *Roberson v. Simons*, 109 *id.* 360. Mere notice by the tenant, before the term expires, that he does not wish the premises for another year, will not change the effect of his holding over. *Smith v. Bell*, 44 Minn. 524.

¹ *Levi v. Lewis*, 6 C. B. N. s. 766; *Ibbs v. Richardson*, 9 Ad. & E. 849; *Den v. McIntosh*, 4 Ired. 291; *Tomkins v. Lawrance*, 8 C. & P. 729. But merely receiving rent from him is not conclusive. *Simkin v. Ashurst*, 1 C. M. & R. 261.

² *Doe v. Bell*, 5 T. R. 472; *Doe v. Weller*, 7 *id.* 478; *Clayton v. Blakey*, 8 *id.* 3; *Knight v. Bennett*, 3 Bing. 361; *Berry v. Lindley*, 3 M. & G. 498; *Barlow v. Wainwright*, 22 Vt. 88; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 *id.* 226; *Lounsbery v. Snyder*, 31 N. Y. 514; *Greton v. Smith*, 33 *id.* 245; *Thomas v. Nelson*, 5 *id.* 118; *Thomas v. Nelson*, 69 *id.* 118; *Laughran v. Smith*, 75 N. Y. 205 (but see *Prial v. Entwistle*, 10 Daly, 398); *Freidhoff v. Smith*, 13 Neb. 5; *Koplitz v. Gustavus*, 48 Wis. 48; *Williams v. Ackerman*, 8 Or. 405; *Railsback v. Walker*, 81 Ind. 409; *Lockwood v. Lockwood*, 22 Conn. 433; *Thurber v. Dwyer*, 10 R. I. 355; *Shepherd v. Cummings*, 1 Coldw. 354; *Rogers v. Wheaton*, 88 Tenn. 665; *Steketee v. Pratt*, 122 Mich. 80; and the lease though void may be referred to, to ascertain and regulate the rights of the parties, *id.*; and see *Porter v. Bleiler*, 17 Barb. 149; *Martin v. Smith*, 43 L. J. Exch. 42.

³ *Thiebaud v. Vevay*, 42 Ind. 212 (see *Montgomery v. Commissioners*, 76 *id.* 362); *Tolle v. Orth*, 75 *id.* 298; *Coomler v. Heffner*, 82 *id.* 108; *Bright v. McOuat*, 40 *id.* 521; *Schuyler v. Leggett*, *supra*; *Hall v. Myers*, 43 Md. 446; *Hobbs v. Batory*, 86 *id.* 68; *Hutton v. Warren*, 2 Gale, 71; *Stoppelkamp v. Maugeot*, 42 Cal. 316; *Cobb v. Kidd*, 19 Blatch. 560; *Hibbard v. Newman*, 2 Baxt. 285; and see § 525, *post*. If the tenant has been notified that if he remains it will be at a higher rent, he is presumed

continued, and rent paid and accepted, the provisions of the old lease will govern the relations of the tenancy so far as applicable.¹] But where three persons entered under a lease for seven years, which was not signed by the lessor and was therefore, under the Statute of Frauds, to be considered a mere tenancy at will, and payments of rent were made which were not shown to be with the assent of one of the three who had not resided a year on the premises; it was held that, as against her there was no evidence of a tenancy from year to year; since, to establish this, it was said that the agreement of all the parties must be shown.² [Though an agent have no authority to make a lease and his attempt to do so may, by law, result only in creating an estate at will; yet entry and payment of rent under such lease may convert the estate into an implied tenancy from year to year.³]

§ 57. *But not on Demises for less than a Year.* — Where a tenant for a term less than a year holds over;⁴ or where the letting is by the quarter, month, or week indefinitely, and not as for an aliquot part of the year, the tenancy is from quarter to quarter, or month to month, &c., until a notice to quit proportionate to such holding is given.⁵ But no such to accept these terms by holding over. *Mack v. Burt*, 5 Hun, 28; *Despard v. Walbridge*, 15 N. Y. 374; *Reithman v. Brandenburg*, 7 Col. 480. But *aliter* if the landlord further demands possession. *Stoppelkamp v. Maugeot*, *supra*.

¹ *Singer Mfg. Co. v. Sayre*, 75 Ala. 270.

² *Doidge v. Bowers*, 2 M. & W. 365; *Denn v. Fearnside*, 1 Wils. 176; *Goodtitle v. Herbert*, 4 T. R. 680.

³ *Hoover v. Pacific Oil Co.*, 41 Mo. App. 317.

⁴ *Stoppelkamp v. Maugeot*, 42 Cal. 316; *Bright v. McOuat*, 40 Ind. 521.

⁵ *Doe v. Hazell*, 1 Esp. 94; *Doe v. Raffan*, 6 *id.* 4; *Anderson v. Prindle*, 23 Wend. 616; *People v. Botsford*, 47 N. Y. 666; *Jones v. Willis*, 8 Jones (N. C.), Law, 430; *Stoppelkamp v. Maugeot*, *supra*; *Skaggs v. Elkus*, 45 Cal. 154; *Hollis v. Burns*, 100 Pa. St. 206; *Rothschild v. Williamson*, 83 Ind. 387; *Coomler v. Heffner*, 86 *id.* 108. Where the tenant holding over proposed to pay a certain monthly rent until he could find another place, and the landlord made no reply, but accepted the rent for the current month, and announced the premises for rent; it was held that this created a monthly tenancy until the tenant should find another place, and not longer. *Hoffman v. McCollum*, 93 *id.* 326. And see *Com. Dig. Est. H. 9*; *Hammon v. Douglas*, 50 Mo. 434, 437. *Coffin v. Lunt*, 2 Pick. 711. But see *Huffell v. Armistead*, 7 C. & P. 56.

continuing tenancy will be held to exist where the agreement stipulates for the payment of rent and for occupation during a simple quarter or month;¹ or it is agreed that the rent be paid annually, if the tenant is expressly stated to hold at the lessor's pleasure.²

§ 58. *How determined.* — Although a tenancy from year to year was said to differ from a tenancy at will only in regard to the right of either landlord or tenant for years to a formal notice to quit;³ yet the right to such a notice has, in fact, made the tenancy for years a term, subject to be determined by a regular notice to quit expiring with the tenant's year.⁴ This tenancy is not determined by the death of either the lessor or lessee;⁵ it is assignable and demisable;⁶ though only during its continuance;⁷ it may be mortgaged;⁸ and may be pleaded as a term.⁹ [Hence a

¹ *Wilkinson v. Hall*, 8 Bing. (N. C.) 508; *Blumenberg v. Myres*, 32 Cal. 93; *Stoppelkamp v. Maugeot*, *supra*.

² *Doe v. Cox*, 11 Q. B. 122.

³ *Phillips v. Covert*, 7 Johns. 1. This was a dictum, correct as to the origin of such tendencies, but not law when uttered. It was repeated in *Bradley v. Covel*, 4 Cow. 349; and *Nichols v. Williams*, 8 *id.* 13; and in this last case the tenant's right to notice was limited to proceedings in ejectment, and he was held liable in summary process without notice.

⁴ *Cattley v. Arnold*, 1 Johns. & H. 651; *Oxley v. James*, 13 M. & W. 209. The same is true of continuing tenancies for a less period than a year.

⁵ *Maddon v. White*, 2 T. R. 159; *Doe v. Porter*, 3 *id.* 13; *Doe v. Wood*, 14 M. & W. 682; *Botheroyd v. Woolley*, 5 Tyrw. 522; *Cattley v. Arnold*, *supra*.

⁶ *Pleasant v. Benson*, 14 East, 284; *Mackay v. Mackeith*, 4 Doug. 218; *Cody v. Quarterman*, 12 Ga. 386; *Curtis v. Wheeler*, 1 Mood. & M. 498; *Austin v. Thomson*, 45 N. H. 113. In *Hemphill v. Giles*, 66 N. C. 512, however, it seems held that an assignment of the landlord's title divests the tenant of his right to notice.

⁷ *Pike v. Eyre*, 9 B. & C. 909.

⁸ *Burrowes v. Gradin*, 1 Dowl. & L. 218.

⁹ *Howe v. Kensett*, 3 Ad. & E. 659; *Tomkins v. Lawrance*, 8 C. & P. 729; *Cattley v. Arnold*, *supra*; *Parrott v. Barnes*, Deady, 405. In Maryland, the Act of 1888, ch. 395, provides that, "all rents reserved by leases or subleases of land made in this State, after the 5th of April, 1888, for a longer period than fifteen years, shall be redeemable at any time after the expiration of ten years from the date at the option of the tenant, after

demise by a tenant from year to year, for a term of years, is not an assignment; for by possibility his tenancy may outlast the term, and he has therefore a reversionary interest in which he may distrain.^{1]}

SECTION III.

TENANCY AT WILL.

§ 59. **How created.**—Tenancies at will may be created by express words, or they may arise by implication of law. [If a tenant be placed on the land without any terms prescribed and as a mere occupier, he is strictly a tenant at will.^{2]} Formerly, all leases for uncertain periods were held to be tenancies at will merely; and if a termor granted the land generally, the grantee was but a tenant at will, for, as it did not appear that the grantor meant to pass his whole interest, an estate at will was held to satisfy the grant.³ But, in modern times, courts have evinced a disposition to construe tenancies of this description into tenancies from year to year,⁴ when circumstances appear to indicate an annual holding.⁵

a notice of six months to the landlord, for a sum equal to the capitalization of the rent reserved, at a rate not to exceed six per centum.” This Act was held to apply to a lease for fourteen years, with a covenant to renew for a like period, the second lease to contain the same covenants as the first. The tenant cannot be estopped by any covenant from claiming the right of redemption at six per cent. *Stewart v. Gorter*, 70 Md. 242. See *Jones v. Linden Building Ass’n*, 79 Md. 73. In South Carolina, a tenancy from year to year looks to the end of the calendar year for its termination, without regard to the time when the tenancy commenced; and this principle applies to leases of city lots as well as of agricultural lands. *Wilson v. Rodeman*, 30 S. C. 210; *Graham v. Seignious*, 53 *id.* 132. In the same State, a tenancy from year to year may be terminated by notice, before the end of the calendar year, deemed to be reasonable, but not necessarily three months. *Jones v. Herald Co.*, 44 *id.* 526.

¹ *Oxley v. James*, *supra*.

² *Johnson v. Johnson*, 13 R. I. 467; *Le Tourneau v. Smith*, 53 Mich. 473.

³ *Griffin’s Case*, 2 Leon. 78.

⁴ *Doe v. Wood*, 14 M. & W. 682. Where there has been an agreement

⁵ §§ 55, 56, *ante*. In Indiana, by statute, no tenancy at will can arise except by express agreement. But holding over, under a privilege to that

§ 60. **Strict and General.** — A distinction must be observed between a strict and a general tenancy at will. The former has only the rights of an ancient tenancy at will or at sufferance, being little more than a license to be upon the land determinable by entry or demand, and often does not create the relation of landlord and tenant, or render the occupant liable for rent in an action for use and occupation, or entitle him to notice to quit;¹ while the latter confers the rights which tenancies at will subsequently acquired, including a reasonable notice to quit; and subjects the occupant to all the liabilities of a tenant proper as well as for use and occupation. Thus one who holds rent-free by permission, or who enters under an agreement to purchase, or for a lease, but has not paid rent, or refuses to accept a lease, is, strictly, a tenant at will.² A parol gift of lands creates this tenancy;

for a lease, and occupation, without payment of rent, the occupant is a tenant at will, but if he afterwards pays rent under the agreement, he becomes a tenant from year to year, *Braythwayte v. Hitchcock*, 10 M. & W. 494. The receipt of rent may be explained so as to rebut the implication of a yearly tenancy. *Doe v. Crago*, 6 C. B. 90. It is held that a tenancy at will is changed into a tenancy for a fixed term by an agreement that, at a future day named, the tenant shall vacate and surrender the premises. *Engels v. Mitchell*, 80 Minn. 122. And an oral lease for a period of years creates a tenancy at will, which may ripen into a tenancy from year to year. *Sartwell v. Sowles*, 72 Vt. 270. See *Barrett v. Cox*, 112 Mich. 220.

¹ The possession of a tenant at will is the possession of the lessor. *Denn v. Fearnside*, 1 Wils. 175.

² *Kirtland v. Pounsett*, 2 Taunt. 145; *Doe v. Stanion*, 1 M. & W. 700; *Doe v. Miller*, 5 C. & P. 595; *Prop'rs v. McFarland*, 12 Mass. 325; *Gould v. Thompson*, 4 Met. 224; per Clarke, J., *Sarsfield v. Healey*, 50 Barb. 246; *Herrell v. Sizeland*, 81 Ill. 457; *Rich v. Bolton*, 46 Vt. 84; § 25, n., *ante*. By statute in New Hampshire, Vermont, and Ohio, as well as

effect in the lease, was held such an agreement. *Bright v. McOuat*, 40 Ind. 521; *Knight v. Ind. Coal Co.*, 47 *id.* 105. A tenancy at will does not arise before entry by the tenant. *Pollock v. Kittrell*, 2 Tayl. 158; *Hardy v. Winter*, 38 Mo. 106. In Missouri an oral contract on the part of tenant to pay rent during the continuance of his tenancy is within the express terms of the statute making such unwritten agreement tenancies from month to month, and only terminable upon one month's notice in writing. (R. S. 1899, sec. 4110.) *Koken Iron Works v. Kinealy*, 86 Mo. App. 199.

and if the donee makes a lease for years, it is void and cannot be rendered valid by the subsequent assent of the donor.¹ So if the agreement be to let the premises so long as both parties choose, reserving a compensation to accrue *de die in diem* and not referable to a year, or to any aliquot parts of a year, this creates a strict tenancy at will.² And where a party enters into possession under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes, by such refusal, a strict tenant at will, for he may be ejected immediately.³ But if the landlord accepts rent from him monthly, or according to the terms of in Massachusetts and Maine, all parol leases are at will; in the three first-named States these may become tenancies from year to year. § 55, n., *ante*; *Thomas v. Sanford Steamship Co.*, 71 Me. 548. In Connecticut, a tenant who holds over after the termination of his tenancy is liable for an additional month's rent, whether his previous occupancy was one for monthly periods with no fixed time of termination, or a definite hiring for one particular month; and this is true irrespective of the provisions of § 2967 of the Gen. Sta. *Byrbee v. Blake*, 74 Conn. 607, and see *Corbett v. Cochrane*, 67 *id.* 570. Though one in possession under a verbal contract of purchase is a tenant at will, he is not liable for rent so long as he performs the terms of his contract or these are waived by the vendor. And improvements made by such tenant while the contract is in force are made by virtue of the contract and not of the tenancy, and so these become a part of the freehold. *Lapham v. Norton*, 71 Maine, 88.

¹ *Jackson v. Rogers*, 1 Johns. Cas. 88; *Jackson v. Bradt*, 2 Caines, Cas. 169; *Patterson v. Stoddard*, 47 Me. 855; *Jones v. Jones*, 2 Rich. 542.

² *Richardson v. Langridge*, 4 Taunt. 128; *Say v. Stoddard*, 27 Ohio St. 478; *Leavitt v. Leavitt*, 47 N. H. 229, 340; *Grovenor v. Henry*, 27 Iowa, 269. A written lease is at will if no term is fixed, although a rate of annual rent is agreed on, and the lessor has the right to re-enter after two years: *Murray v. Cherrington*, 99 Mass. 229; *Cudley v. Randall*, 4 Mod. 9. *Aliter*, when the lease is for a definite number of years, with provision that it shall continue for another year thereafter unless terminated by notice. *Dix v. Atkins*, 130 Mass. 171. A written agreement for an uncertain time is at will: *Gardner v. Hazelton*, 121 Mass. 494; or not fixing any time or rent: *Larned v. Hudson*, 60 N. Y. 102. See also *Morton v. Woods*, 9 B. & S. 632, 644. A tenant who holds over under promise of a lease is at will, not at sufferance. *Emmons v. Scudder*, 115 Mass. 867.

³ *Dunne v. Trustees*, 39 Ill. 578; *Denn v. Fearnside*, 1 Wils. 176; *Doe v. Watts*, 7 T. R. 88; *Bennett v. Ireland*, Ellis, B. & E. 826; *Chamberlain v. Dunshee*, 45 Vt. 50; *Rich v. Bolton*, *supra*.

the original agreement, a general tenancy at will is created, commencing from the time of entry.¹ If a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, he is not a tenant from year to year, but strictly at will so that he may be ejected without notice.² But while a man who enters under a void lease is strictly at will,³ if he pays rent he becomes a general tenant at will or from year to year according to circumstances; although a notice to quit will always terminate this tenancy, or turn it into a tenancy from year to year.⁴

§ 61. *Strict and General distinguished.* — The agreement, express or implied, for a periodical rent or time is the usual criterion to distinguish between strict and general tenancies at will.⁵ The decisions in regard to the latter class of tenancies have turned chiefly on the question of notice; and it is difficult to say how far the characteristics of a term, such as assignability, &c., which have been held to belong to tenancies from year to year,⁶ will be construed to apply to general tenancies also.⁷ In Massachusetts and Maine, tenancies from year to year are held not to exist, and all oral tenancies are strictly at will.⁸

¹ *Anderson v. Prindle*, 23 Wend. 616; *Milling v. Becker*, 96 Pa. St. 182.

² *Jackson v. Miller*, 7 Cow. 747; *Jackson v. Moncrief*, 5 Wend. 26; *Dubuque v. Miller*, 11 Iowa, 583.

³ Mere occupation will not amount to a ratification of a void lease. To that end some new promise to perform the terms of the lease, or something equivalent thereto, is necessary. *McIntosh v. Lee*, 57 Iowa, 356.

⁴ *Bradley v. Covel*, 4 Cow. 349; *Ezelle v. Parker*, 41 Miss. 520; *Reed v. Landon*, 5 Bush (Ky.), 21.

⁵ *Leavitt v. Leavitt*, 47 N. H. 329, 340; *Anderson v. Prindle*, 23 Wend. 616, and cases *supra*; and the mere fact of payment, or admission that some rent is due, has been held evidence of such agreement: *Knight v. Burnell*, 3 Bing. 361; *Cox v. Bent*, 5 *id.* 185; and see § 56, *ante*.

⁶ § 58, *ante*.

⁷ As the right to a definite notice to quit was the ground upon which, notwithstanding the Statute of Frauds, tenancies from year to year were construed as terms; and as this right is secured to general tenancies at will by statute or the decision, no valid reason would seem to exist why the latter should not be placed on the same footing as the former.

⁸ *Ellis v. Paige*, 1 Pick. 43, but see 2 *id.* 71, n.; *Davis v. Thompson*,

§ 62. **How determined.** — A strict tenancy at will may be determined by either party, at any time, subject to statutory provisions; but a general tenancy at will can be terminated only by a notice to quit proportioned to the usual periods of holding.¹ Thus if the rent is payable quarterly, and the lessor determines his will after the commencement of a new quarter, he will lose the rent that would otherwise accrue for that quarter, and the lessee will be entitled to emblements.² So if the lessee determines his will before the end of a quarter, he must pay the rent of the quarter in which the tenancy is determined.³ But a strict tenancy at will may also be determined by implication of law; and such implication will arise on the death of either party,⁴ from acts of ownership over the property exercised by the landlord, such as entering and cutting timber or carrying away stone, making partition among liens, taking a distress for rent,⁵ or alienating the reversion.⁶ So if the tenant repudiates the ten-

13 Me. 209; *Goodenow v. Allen*, 68 Me. 204; § 29, *ante*. (See also *Hammon v. Douglas*, 50 Mo. 434, 436.) And although the statutes of both States have required a definite notice to quit even where the lease is by agreement strictly at will: *Batchelder v. Batchelder*, 2 Allen, 105; yet such tenancies are liable to defeat by act of law: *Howard v. Merriam*, 5 Cush. 563; *Withers v. Larrabee*, 48 Me. 570. This construction practically defeats the statute; as a colorable alienation, even by a lease, determines the will. *Curtis v. Galvin*, 1 Allen, 215; *Pratt v. Farmer*, 10 Allen, 519; *Hilbourn v. Fogg*, 99 Mass. 11; *Dunshee v. Grundy*, 15 Gray, 314. In Maine it is doubtful whether a tenancy at will under a verbal lease is a conditional estate, to be determined after a time fixed or on the happening of a certain event; the statute providing that such tenancies may be determined by thirty days' notice and not otherwise except by mutual assent. *Goodenow v. Allen*, *supra*.

¹ *Prickett v. Ritter*, 16 Ill. 96; *Davis v. Thompson*, 13 Me. 209; *Chapman v. Tiffany*, 70 N. H. 249.

² *Leighton v. Theed*, 1 Ld. Ray. 707.

³ *Bowe's Case*, Aleyn, 4; *Walker v. Furbish*, 11 Cush. 366; *Withers v. Larrabee*, 48 Me. 570; *Whitney v. Gordon*, 1 Cush. 266. As to length of notice, see § 478, *post*.

⁴ *Robie v. Smith*, 21 Me. 114.

⁵ *Rising v. Stannard*, 17 Mass. 284; *Doe v. Turner*, 7 M. & W. 226; s. c. 9 *id.* 643; *Reed v. Reed*, 48 Me. 388; *Adams v. McKesson*, 53 Pa. St. 81; *Turner v. Bennett*, 9 M. & W. 643.

⁶ *Bunton v. Richardson*, 10 Allen, 260; *Parmelee v. Oswego & Sy.*

ancy,¹ commits an act of voluntary waste,² sells or transfers his interest to another, deserts the premises, or in any other way discontinues his lawful possession, he puts an end to the tenancy. For, independently of his temporary right of possession,³ a tenant at will has no certain, indefeasible estate in the premises; his relation to the landlord is of a personal character; and he has, consequently, no interest which he can transfer to another or over which he can exercise any control.⁴ [But although a tenant at will cannot transfer any of his rights to another, and his tenancy ends if he makes such a transfer and surrenders the occupancy, the person taking it coming in as a trespasser only; yet where such person claims the right of occupancy simply by virtue of his assignment, the recognition and allowance of such claim by the owner of the premises makes the occupant a tenant at will like his predecessor, and his occupation continues the possession of the owner.⁵]

§ 63. Notice to quit generally Necessary to determine. — At common law, neither a tenant at will nor by sufferance was entitled to notice to quit before ejectment, although a demand of possession was always necessary. The words, "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, were held to be a sufficient determination of his will and equivalent to a demand of possession, so as to maintain ejectment.⁶ A tenant at will was held to become a trespasser by any unreasonable delay to

R. R., 6 N. Y. 74; *Hayden v. Ahearn*, 9 Gray, 438; *Ball v. Cullimore*, 5 Tyrw. 753; *Ellis v. Paige*, 1 Pick. 43; *Kelly v. Waite*, 12 Met. 300; *Pratt v. Farrar*, 10 Allen, 519; *Esty v. Baker*, 50 Me. 325.

¹ *Chamberlain v. Donohue*, 45 Vt. 50; *Rich v. Bolton*, 46 *id.* 84; *Shaw v. Hill*, 79 Mich. 86. See § 472, *post*.

² *Daniels v. Pond*, 21 Pick. 367; *Phillips v. Covert*, 7 Johns. 1.

³ *Reckhow v. Schanck*, 43 N. Y. 448; *King v. Lawson*, 98 Mass. 309; *Clark v. Wheelock*, 99 *id.* 14; *Hart v. Bouton*, 152 Mass. 440.

⁴ *Phillips v. Covert*, 7 Johns. 1; *Doak v. Donelson*, 2 Yerg. 249; *Warner v. Paige*, 4 Vt. 291; *Cooper v. Adams*, 6 Cush. 87; *Chandler v. Thurston*, 10 Pick. 209; *Daniels v. Pond*, *supra*.

⁵ *Landon v. Townshend*, 129 N. Y. 166.

⁶ *Doe v. Price*, 9 Bing. 356; *Ellis v. Paige*, 1 Pick. 47.

remove after the estate had been determined.¹ But the statutes of most of the States now require formal notice to be given before a tenant can be proceeded against.² A vendee in possession before he has completed the purchase stands upon the footing of a tenant at will, and is entitled to a demand of possession before ejectment can be brought against him although not to a formal notice to quit.³ So a grantor who continues in possession after the conveyance is executed is a tenant at will of the grantee, and after a refusal to deliver possession may be treated as a disseisor and removed in a similar manner.⁴ But where, upon the sale of a term of years it was agreed that, if the purchaser did not pay the residue of the purchase-money on a certain day, he should forfeit the instalment already paid and should not be entitled to an assignment of the lease; this was held to operate as a clause for re-entry, on a breach of covenant in the lease; so that the vendor might maintain ejectment, without either a demand of possession or notice to quit.⁵

SECTION IV.

A TENANCY AT SUFFERANCE.

§ 64. *Defined.* — A tenancy at sufferance arises when a man comes into possession lawfully, but holds over wrong-

¹ *Ellis v. Paige*, *supra*; *Rising v. Stannard*, 17 Mass. 282; *Livingston v. Tanner*, 14 N. Y. 64; *Welch v. Winterburn*, 25 Hun, 437.

² Under Mich. Comp. L., § 4304, it was held, that a tenant holding over, not being a tenant at will, unless holding by express or implied consent, was not entitled to the notice to quit provided for in the case of tenancies by sufferance or at will. Cooley, J., said: "The statute evidently intends a case of a holding where the occupant has some equities which would render it unjust that he should be required to surrender immediate possession; but he cannot acquire such equities by a mere wrongful holding over which is neither assented to nor acquiesced in." *Benfrey v. Congdon*, 40 Mich. 288. See *Huntington v. Parkhurst*, 87 Mich. 38.

³ *Right v. Beard*, 13 East, 210. See § 25, *ante*, and note; §§ 470-472, *post*.

⁴ *Currier v. Earle*, 13 Me. 216.

⁵ *Doe v. Sayer*, 3 Camp. 8; *Jones v. Chamberlaine*, 5 M. & W. 14.

fully, after the determination of his interest; differing in this respect from a tenancy at will, where the holding is by the landlord's permission.¹ A tenant at sufferance has only a naked possession, he stands in no privity to the landlord and cannot maintain an action of trespass against him; and, independently of statute provision, he is not entitled to notice to quit.² Nor is he liable to pay rent, for he holds by the mere neglect of the landlord to take possession, and the latter may enter and put an end to the tenancy whenever he

¹ 4 Kent, Com. 113; *Edwards v. Hale*, 9 Allen, 462; *Abeel v. Hubbell*, 52 Mich. 37; *Smith v. Singleton*, 71 Ga. 68. In Michigan it is held that the rule that one who comes into possession of land lawfully, and holds after the expiration of his right, becomes a tenant at sufferance, does not apply where original right of occupancy is vested in the tenant by operation of law. The court say: "While we have been cited to numerous cases and text-books in which the definition of a 'tenant at sufferance' is broad enough to include any person who, being lawfully put in possession of property, holds over after the termination of the estate, we have had our attention called to no case in which the [above] distinction, which apparently existed at the common law, has been repudiated, except *Jackson v. Cairns*, 20 Johns. 301, the doctrine of which is in conflict with *Jackson v. Harsen*, 7 Cow. 323, . . . and is opposed to the language of the court in *Livingston v. Tanner*, *supra* [14 N. Y. 9]. *Graydon v. Hurd*, 5 C. C. A. 258 (55 Fed. Rep. 724), was a case in which the relations between the parties depended upon contract. The case is not, therefore, in conflict with the views herein expressed." *Pattison v. Dryer*, 98 Mich. 564.

² *Livingston v. Tanner*, 14 N. Y. 9; *Moore v. Morrow*, 28 Cal. 551; *Hollis v. Pool*, 3 Met. 350; *Hauxhurst v. Lobree*, 38 Cal. 563. Difficulties have arisen from the application of statutes providing for notice to tenants at sufferance. See N. Y. 2 R. S. 513; N. H., R. S. ch. 209, § 1; Ky., G. S. ch. 66, art. 6, § 1; Mich., Comp. L. § 4804. The tenant cannot claim the benefit of the notice when he has asserted a title that directly or by implication negatives the landlord's right to terminate the tenancy. *Kunzie v. Wixcom*, 39 Mich. 384, and see *Benfrey v. Congdon*, 40 *id.* 283, as cited § 63, *ante*. In New York, the courts, to avoid the absurdity of notifying a tenant who clearly knew when his term ended, and thereby prolonging it, held that he is not at sufferance until he has held long enough to imply the landlord's assent. *Rowan v. Lytle*, 11 Wend. 617; *Smith v. Littlefield*, 51 N. Y. 539; § 718, n., *post*. But this is open to the objection that such assent rather makes a tenancy from year to year; § 55, *ante*. By the Kentucky statute a tenant is at sufferance for ninety days after his term, if this be for a year or more. *Mendell v. Hall*, 13 Bush, Ky. 232.

thinks proper.¹ But before entry the landlord cannot maintain trespass against a tenant by sufferance; for, being once in by lawful title, the law supposes the continuance of a lawful possession, unless the owner, by some act, like entry or demand, declares such a continuance to be wrongful.² But if the occupant has come into the estate by act of law and not by an act of the party, he is, after the estate has ended, not even a tenant at sufferance, but an intruder, abator, or trespasser.³

§ 65. **Landlord's Option.** — **Tenant may become Tenant at Will, or for Years.** — If a tenant for years surrenders his lease, and then holds over, he will become either a tenant by sufferance or a disseisor, at the option of the landlord.⁴ So an under-tenant, who is in possession of the estate at the termination of the original lease, and is permitted by the reversioner to hold over, is a *quasi* tenant at sufferance; and the mere fact of occupation, even coupled with the payment of rent for the period of his occupation, does not raise the

¹ *Smith v. Houston*, 16 Ala. 111; *De Young v. Buchanan*, 10 Gill & J. 149; *Dixon v. Haley*, 16 Ill. 145; *Hurd v. Miller*, 2 Hilt. 540; *Delano v. Montague*, 4 Cush. 42; *Flood v. Flood*, 1 Allen, 217; *Emmons v. Scudder*, 115 Mass. 367. But he is liable in use and occupation. *Harding v. Crethorn*, 1 Esp. 57; *Bayley v. Bradley*, 5 C. B. 396; *Christy v. Tancred*, 7 M. & W. 127; *Ibbs v. Richardson*, 9 Ad. & E. 849; *Wright v. Roberts*, 22 Wis. 161. By Mass. Pub. Sts. c. 121, § 5, he is made liable for rent; but this does not apply to one who occupied in right of his wife and remains in after her estate ended. *Merrill v. Bullock*, 105 Mass. 481. See *Porter v. Hubbard*, 134 Mass. 233. In *Bush v. Nat. Oil Refining Co.*, 5 W. N. C. 143, it was expressly held that such tenant is liable in *assumpsit* for use and occupation for the interval between the termination of the lease and the election of the lessor to treat him as a trespasser, and so, *Williams v. Ladew*, 171 Pa. 377.

² Co. Lit. 270, 576; *Jackson v. Parkhurst*, 5 Johns. 128; *Jackson v. McLeod*, 12 *id.* 182.

³ 2 Bl. Com. 150; Co. Lit. 57, b; 2 Inst. 134. Thus a woman who remains in her former husband's house after a divorce from him. *Brown v. Smith*, 83 Ill. 291. But a wife who occupied with her husband premises hired by him does not become a tenant at sufferance by remaining after his term ends, but his tenancy at sufferance still continues. *Knowles v. Hull*, 99 Mass. 562.

⁴ *Pennington v. Morse*, Dy. 61, b.

presumption of a demise for years unless there is evidence of an agreement to demise the term.¹ A tenant at will acquires possession by the consent of the owner; and, if such consent can be inferred from any act of the landlord, a tenant at sufferance will become a tenant at will or from year to year, according to circumstances.² And in the case of a tenant for years holding over, if the lessor receives rent or the lessee is permitted to continue on the land for a year, the tenancy by sufferance will be turned into a tenancy from year to year.³ But where a tenant holds over after the determination of an estate for years; or a person selling land agrees to deliver possession on a particular day and afterwards refuses to do so and continues in possession, he is, in either case, tenant at sufferance.⁴ [After a sale of mortgaged premises pursuant to a power of sale contained in the mortgage, the mortgagor, if he thereafter remains in possession, is a tenant at sufferance.⁵ So a *cestui que trust* of the use and improvement of an estate, holding after his interest has ceased, becomes a tenant at sufferance.

SECTION V.

DEMISE OF LODGINGS.

§ 66. **Status of the Occupant.** — The growing frequency of the occupation of “flats” or “suites” — subdivisions of a house or other entire structure — has given rise to many questions in determining whether the occupant is technically a tenant or not; that is, whether he has an interest in the realty, or only a personal contract. While there can be a

¹ *Simkin v. Ashurst*, 1 C. M. & R. 261.

² *Rowan v. Lytle*, 11 Wend. 619.

³ *Doe v. Stennett*, 2 Esp. 717; and see §§ 55, 56, *ante*.

⁴ *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *Hollis v. Pool*, 8 Met. 350; *Hildreth v. Conant*, 10 *id.* 298; *Rising v. Stannard*, 17 Mass. 282.

⁵ *Kingsley v. Ames*, 2 Met. 29; and see *Howard v. Merriam*, 5 Cush. 576; *Doe v. Giles*, 5 Bing. 421; *Doe v. Maisey*, 8 B. & C. 767.

⁶ *Godfrey v. Walker*, 42 Ga. 562. And see *Brown v. Smith*, 83 Ill. 291.

tenancy of real estate though in a single room,¹ or in furnished rooms;² yet this can only be created by clear terms of demise.³ [But ordinary flats are as much separate dwellings as adjoining houses, and it makes no difference whether the structure is divided vertically or horizontally.⁴ And it is held that a lease of specified rooms in a house containing a restaurant was valid, although the lessor undertook to serve a private table and to furnish certain other accommodations to the lessee, and imposed certain restrictions on the manner of the use and occupation of the rooms.⁵] Generally where tenements are separate, although under one roof, yet if the owner does not reside as such on the premises, or retain control of the whole, a letting will create a tenancy, and interest in real estate, although there is an outer door or gate in charge of a porter; as the tenants have an equal control thereof, or easement therein,⁶ and may maintain trespass *quare clausum fregit* for an unlicensed entry by the landlord.⁷ The word "lodger," on the contrary, though the

¹ Coke, 3 Inst. 65; Fenn v. Grafton, 2 B. N. C. 617; Izon v. Gorton, 5 id. 1; Stockwell v. Hunter, 11 Met. 448; and see cases § 520, n., *post*.

² Newman v. Anderton, 5 B. & P. 224; Smith v. Marrable, 11 M. & W. 5; Wilson v. Finch Hatton, 2 L. R. Exch. Div. 836; Mechelen v. Wallace, 7 Ad. & E. 49. And the landlord's agreement to supply furniture as part of the demise is within the Statute of Frauds, and must be in writing. *Ibid*.

³ Cases *supra*; Cook v. Humber, 11 C. B. n. s. 44. Edge v. Strafford, 1 C. & J. 391; and Inman v. Stamp, 1 Stark, 12, are put on this ground in Wright v. Stavert, 2 E. & E. 721, 725.

⁴ Stamper v. Sunderland, L. R. 3 C. P. 388. It has been said that "The possession of the street door may be taken as a criterion. If exclusive control is retained by the landlord, so that the tenants could only come in and go out with his assent and permission, then it may be said that they are mere inmates and lodgers, and not lessees." Per Cockburn, C. J., in Queen v. St. Geo. Union, L. R. 7 Q. B. 90, 97, 98.

⁵ Porter v. Merrill, 124 Mass. 584.

⁶ Evans v. Finch, Cro. Car. 473, where chambers in the Inns of Court were held a tenement; Wright v. Stockport, 5 M. & G. 83; Rex v. Unsworth, 5 Ad. & E. 261; Judson v. Lockett, 2 C. B. 197; Toms v. Lockett, 5 id. 23; Downing v. Lockett, *id.* 40; Score v. Huggett, 7 M. & G. 95; Swain v. Mizner, 8 Gray, 182; Henrette v. Booth, 15 C. B. n. s. 100; Young v. Boston, 104 Mass. 95.

⁷ Queen v. St. Geo. Union, L. R. 7 Q. B. 90, 97.

term is not technical, intends one who occupies a portion of a tenement which is under the control or in the occupancy of another. He cannot have trespass *quare clausum fregit* if entered upon, and is not liable for rent or in use and occupation, but can sue or be sued only for a breach of the agreement.¹ His agreement is not within the Statute of Frauds, and his rights do not differ from those of a boarder in a hotel or boarding-house, who has no interest in the realty even although he has a contract for the use of specific rooms.² The respective rights of the owner and lodger are therefore to be determined, not by the law of landlord and tenant, but by the law of personal contracts.³

§ 67. **Lodgers quasi Tenants.** — Thus lodgers are entitled to the privileges of tenants, although their rights rest on different grounds; and if one takes lodgings on the first or second floor of a house he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and the water-closet, unless it is otherwise stipulated at the time of taking the lodgings; and, if the landlord deprives him of the use of either, an action lies.⁴ He is subject to the same liabilities as other tenants; and is not justified in quitting his apartments without giving proper notice, even from a fear, however reasonable, that his goods may be seized for the landlord's rent.⁵ But if his goods be distrained together with those of the lessee, and sold first, the landlord having been notified of his ownership of them, he may sue for

¹ *Lee v. Gansel*, Cowp. 1; *Fludier v. Lombe*, Ca. T. Hardw. 807; *Doe v. Laming*, Ry. & M. 86; *Dobson v. Jones*, 5 M. & G. 112; *Davis v. Waddington*, 7 *id.* 85; *Wansey v. Perkins*, *id.* 151; *Monks v. Dykes*, 4 M. & W. 567; *Smith v. Lancaster*, L. R. 5 C. P. 246; *Brown v. McGowan*, *id.* 289; *Hartley v. Banks*, 5 C. B. N. S. 40; *Roads v. Trumpington*, L. R. 6 Q. B. 56, 62.

² *White v. Maynard*, 111 Mass. 250; *Wright v. Stavert*, *supra*; *Wilson v. Martin*, 1 Denio, 602; *Polack v. Shafer*, 46 Cal. 270; *Brown v. McGowan*, *supra*; *Ambler v. Skinner*, 7 Rob. (N. Y.) 561.

³ *Kirkman v. Jervis*, 7 D. P. C. 678. Here the landlord's misconduct having caused the lodger to leave, the latter was held to pay compensation during the time he actually occupied.

⁴ *Underwood v. Burrows*, 7 C. & P. 26.

⁵ *Rickett v. Tullick*, 6 C. & P. 66; *Griffith v. Hodges*, 1 *id.* 419.

damages for an excessive distress, if the tenant's goods are sufficient to satisfy the rent due and the charges.¹ But with respect to legal process, a marked distinction exists between a lodger and a tenant, properly so called. While for the purpose of his personal protection the premises in the former's occupancy may be regarded as a house in case of burglary, yet in the execution of civil process, they are subject to be entered with force by the officer;² whereas the separate apartments or flat in the occupancy of the tenant in a tenement house or hotel cannot be so entered, even although the outer door is peaceably entered.³ [It is held that the measure of damages for the loss of the rental value of furnished rooms is the net rental value after deducting the expenses necessarily incident to the carrying on of the business of a lodging house.⁴]

¹ *Wilkinson v. Ibbett*, 2 F. & F. 300; *Fisher v. Alger*, 2 C. & P. 374.

² *Tracy v. Talbot*, 6 Mod. 214; 1 Hawk. P. C. 163, § 15; *Lee v. Gansel*, *supra*.

³ *Swain v. Mizner*, 8 Gray, 182.

⁴ *Kohne v. White*, 12 Wash. 199. See *Cummins v. Hanson*, 10 Daly, 493. In Missouri, all contracts for the leasing of buildings in cities, towns, or villages, not in writing, signed by the parties or their agents, are to be tenancies from month to month, and may be terminated by either party giving to the other one month's notice, in writing. R. S. 1889, § 6371; *Combs v. Midland Trans. Co.*, 58 Mo. App. 112.

CHAPTER III.

THE DURATION OF A TENANCY.

SECTION I.

THE COMMENCEMENT OF A LEASE.

§ 68. **Fixed by Delivery of Deed, and Entry.** — At common law, actual livery of seisin was necessary to complete a grant of an estate of inheritance or for life; although this was not necessary where a lease for years or other mere chattel interest. But now a delivery of the deed is substituted for livery of seisin; from which delivery all grants, whether for life or for years, are to take effect.¹ But in leases for years an actual entry is still necessary to vest possession in the lessee; for the bare lease gives, as we have seen, only a right to enter, or *interesse termini*.² When he enters in pursuance of that right, and so is in possession of the term, he becomes a tenant for years. And, regarding the lease as a contract, if the time from which the term is to commence does not otherwise appear, it will be understood as the time when the papers are dated, or, if not dated, from the time when they were delivered.³ If there are no writings, the commencement of the tenancy will be any day fixed by the parties, except that the interest of the tenant will only begin upon entry; and if there has been no day fixed, the tenancy will

¹ § 34, *ante*.

² § 15, *ante*.

³ Thus where a lease of a lot was made for a term of years, and afterwards, for the purpose of increasing the depth of the lot, another lease was made of land adjoining the first lot, in the rear, the latter lease expiring at the same time as the former and containing like covenants; *semble*, that these were separate leases. *Livingston v. Sage*, 95 N. Y. 289.

commence with the tenant's entry and not from any particular quarter-day.¹ [The first day mentioned in a demise as the commencement of the tenancy is the first day of the term, whether the expression used be "on" the day specified or "from" the day.²]

§ 69. **Of Payment of Rent, Effect to fix. — Other Circumstances.** — A receipt for rent to a particular day is *prima facie* evidence of the commencement of a tenancy at or previous to that day. And, if a tenant enters in the middle of a quarter, and afterwards pays rent to the beginning of the succeeding quarter, and from that time pays half-yearly, his tenancy will be deemed to have commenced from the quarter-day to which he paid up.³ But where a tenant, under a written lease, continues to hold over after the expiration of his tenancy, and assigns his interest to another person, the new tenancy, if recognized by the landlord, will be held to have commenced at the time the original lease commenced,

¹ Church v. Gilman, 15 Wend. 656; Co. Lit. 46, a; Jackson v. Bard, 4 Johns. 280; Kemp v. Derrett, 3 Camp. 510. In Inman v. Stamp, 1 Stark. 12; Edge v. Strafford, 1 C. & J. 391, it was held that parol leases, though for less than three years, created no rights or obligations as leases before entry, being agreements exceeding a year under the Statute of Frauds. See also Tully v. Dunn, 42 Ala. 262; Horsey v. Graham, 12 W. R. 141. But in Huffman v. Starkes, 81 Ind. 474; Birkhead v. Cummings, 83 N. J. 44, it was held that the statute did not apply to leases within the exception of three years, and that these were complete, as to all but mere possessory rights, so soon as made.

² Sidebotham v. Holland, 1895, 1 Q. B. 878.

³ Doe v. Johnson, 6 Esp. 10. One who purchases premises held by another under a parol lease, and accepts the stipulated rent, recognizes the tenancy on the terms of the original lease. Murphy v. Little, 69 Vt. 261. The presumption in England is, that a holding is intended to be in accordance with the regular quarter-days stated in the lease rather than with the date of the lease: Sandhill v. Franklin, L. R. 10 C. B. 842; but if no quarter-days are named, the date of the lease controls as to payment of rent, and notice to quit: Doe v. Matthews, 11 C. B. 675. It has been held that although a tenancy begins in the middle of a quarter, yet if by agreement the rent is payable on the regular quarter-days, or payments are in fact so made, then the year will, according to circumstances, date either from the previous or succeeding quarter-day. Tyng v. Theological Seminary, 46 N. Y. S. C. 250.

although the assignee came in on a different day.¹ Notice to quit on a particular day is not evidence of a holding from that day.² And, when the premises contained in a demise consisted of a dwelling-house and other buildings, which were to be used for the purpose of carrying on a manufacture, a few acres of meadow and pasture lands, together with all watercourses, &c., which the tenant held under a written agreement for a lease, to commence, as to the meadow, from the 25th December, then last past, as to the pasture ground from the 25th March then next, and as to the houses, mills, and all the rest of the premises, from the 1st of May, the court held that the substantial time of entry was the 1st of May, because the principal subject of the demise was the house and buildings for the purpose of the manufacture, to which everything else in the demise was merely auxiliary.³

§ 70. **Tenancy for Years to have fixed Beginning.** — An estate for life needs no expression of the time at which it is to commence, because it cannot, at common law, commence *in futuro* nor can its duration be ascertained; but it is of the very essence of a term of years to be fixed and determined; and, therefore, unless some certain beginning or event is referred to by which its commencement may be ascertained, it will be void for uncertainty.⁴ [And the day fixed in the lease, as that on which the tenant is to have possession of the premises, is so much of the essence of the contract, that, if

¹ Doe v. Samuel, 5 Esp. 174. So where a lessee whose term began and ended at midsummer sublet for a year from Michaelmas, and the subtenant acknowledged the new lessee whose term began at midsummer, it was held that the sublessee's holding was still from Michaelmas to Michaelmas. Kelly v. Patterson, L. R. 9 C. B. 681.

² Doe v. Forster, 13 East, 405.

³ Doe v. Watkins, 7 East, 551; Steele v. Mart, 4 B. & C. 272; Doe v. Benson, 4 B. & A. 588. A lease was dated Jan. 25, 1853, to run from the first day of April next, for the full term of five years thence next ensuing, at a yearly rent of four thousand dollars, in equal quarterly payments on the first days of April, July, October, and January, in each year during the term; and it was held that the term commenced on the first day of April, 1853, and included that day. Deyo v. Bleakley, 24 Barb. 9.

⁴ 1 Prest. Est. 201; Bac. Abr. Leases (L.), 3.

the lessor refuse to give the lessee possession on that day, the latter may rescind the contract.¹] But a lease to commence or terminate on a contingency which must happen is valid; for then its duration is made certain.² Thus, a lease from the day of the lessor's death until the 1st of May, 1629, was held to be good for so much of the term as remained after the lessor's death.³ And it is no objection to the validity of the lease that a term for years is to commence as of a day which is past; for in that case, the lease will take effect, in point of computation, from that day, but in point of interest, from delivery.⁴

§ 71. **Impossible Dates.** — As to an impossible or uncertain date, there appears to be this nice distinction made; that if a lease be expressed to begin from an impossible date, — as from the 30th day of February, — it takes effect from delivery; but where the limitation is uncertain, — as a lease made the 10th of October, to hold from the 20th day of November, without saying what November is meant, — the lease is void; because the limitation is part of the agreement, and the court cannot determine it, not knowing the terms of the contract.⁵ But where a lease was dated 25th March, 1783, to hold from the 25th March now last past, and it was proved that it was not executed until some time after date, and rent was reserved from March 25th, 1783, it was held that the term commenced on March 25th, 1783, and not on March 25th, 1782;⁶ for, although there may appear to be no certainty of years in a lease, yet, if, by reference to a certainty, it may be made certain, this is sufficient.⁷

§ 72. **Future Possession. — Interesse Termini.** — When an estate for years is made to commence at a day to come, or

¹ *Spencer v. Burton*, 5 Blackf. 57.

² *Goodright v. Richardson*, 3 T. R. 462.

³ *Child v. Baylie*, Cro. Jac. 459.

⁴ *Moore v. Musgrave*, Hob. 18; *Enys v. Donnithorne*, 2 Burr. 1192.

⁵ Bac. Abr. Leases (L.), 1. A lease from the — day of — 1866, for eighteen months, will be held to continue after July 1st, 1867. *Huffman v. McDaniel*, 1 Or. 259.

⁶ *Steele v. Mart*, 4 B. & C. 272.

⁷ *Shep. Touch.* 272.

on the happening of a particular event, it is called an *interesse termini*, or a right to the possession of a term at a future time.¹ Such a demise vests in the lessee a complete right to the possession of the premises on the day fixed by the agreement for the commencement of the term; and, being a mere chattel interest, was never required to be created by feoffment and livery of seisin.² But an estate for life, whether it lie in livery or in grant, cannot begin at a day to come, because a freehold may not be placed in abeyance.³ And, since no estate of freehold can commence *in futuro*, a lease to commence after the death of a lessor or of a lessee for life is not good, unless there be some subsisting estate which will fill the intermediate time.⁴ If a term of years is granted in possession and a second lease is afterwards made, to commence at the expiration of the existing lease, no reversion will pass by the second deed, nor will the second lessee be entitled to any interest under it, except a mere *interesse termini*, and the lessor will consequently be entitled to the rent reserved by the first lease, and may distrain for it like any other reversioner.⁵ But where a lease under seal is concurrent with the first lease, it conveys the reversion, and not a mere *interesse termini*; and although no entry is made under it the estate vests and the right to distrain follows.⁶

¹ See § 15, *ante*.

² *Winter v. Loveday*, 1 Comyn, 39.

³ 1 Prest. Est. 117; 2 Bl. Com. 314; *Singleton v. Bremar*, 4 McCord, 12.

⁴ 1 Prest. Est. 231; *Weale v. Lower*, Pollexf. 55.

⁵ *Smith v. Day*, 2 M. & W. 684. So where lessee held over, the original lessor, and not one to whom he had granted a lease and who was entitled to an *interesse termini*, recovered the double rent given by statute, *Blatchford v. Cole*, 5 C. B. N. s. 514; and so a surrender to produce merger must be made to the lessor not to the owner of an *interesse termini*. *Edwards v. Wickwar*, 35 L. J. N. s. 309.

⁶ *Colbourne v. Mixstone*, 1 Leon. 129; *Doe v. Rawlins*, 5 B. & C. 121; *Harmer v. Bean*, 3 C. & K. 307.

SECTION II.

THE TERMINATION OF A LEASE.

§ 73. **Terms not limited by Law.** — Terms were originally of short duration; and Lord Coke says that, by the ancient law of England, they could not exceed the duration of an ordinary generation of forty years, for the reason that, if leases could be made for a longer period, men might be disinherited. This doctrine of the common law, however, had become antiquated even in his day, and was soon after abolished altogether.¹ There is now no limitation to the extent of a term of years, either in England or the United States [except as to certain agricultural leases in New York, and in Alabama²].

§ 74. **Perpetual and Conditional Leases.** — Leases may be of perpetual duration; and these are usually in the form of a grant in fee, reserving the payment of an annual rent instead of a present consideration. Of this class the New York manor-leases and the Pennsylvania fee-farm leases are examples.³ Or they may be leases to continue so long as the lessee shall continue to pay the rent, and perform the cove-

¹ Co. Lit. 45, b ; 46, a ; Theobalds v. Duffoy, 9 Mod. 101.

² In New York by the Constitution of 1846, Art. 1, § 14, agricultural leases are good for twelve years only, if held on the reservation of a periodical rent or service, to be paid as compensation for the use of the estate granted. It is competent to make a grant for agricultural purposes for a life or lives, upon a consideration to be paid for the estate all at once, or by instalments, or in services; so that this be not paid by way of rent, according to the common-law definition of that term. *Parcell v. Stryker*, 41 N. Y. 480. And there seems to be no objection to a longer lease of such lands where their use is restricted in terms to other than agricultural purposes. *Odell v. Durant*, 62 N. Y. 524. An agricultural lease for more than twelve years is not valid for twelve years but absolutely void. *Clark v. Barnes*, 76 N. Y. 301. But, in Alabama, while the statute declares that "no leasehold estate can be created for a longer term than twenty years" (Code, § 2190), it is held that this does not make a lease for a longer term void *in toto*; and that, on general principles, such a lease is void only as to the excess above the twenty years. *Robertson v. Hayes*, 83 Ala. 290.

³ § 50, *ante*; §§ 261, 284, 285, 370, 440, *post*.

nants in them; thus, a demise to A. B., his heirs and assigns, for such a term of time as he pays rent, he, on his part, covenanting for himself and his heirs to pay rent and perform covenants, is a perpetual lease; and can only be terminated by mutual agreement, or by the election of the lessor, on default of the lessee to pay rent and perform the covenants, to consider it forfeited.¹ [So a lease, "as long as water runs, or grass grows," is good as a perpetual lease,² and is said to convey a fee.³ A lease during the time the property shall be used for a certain purpose, it being granted for a present money consideration, is held to be a lease in perpetuity at the will of the lessee and to convey a base or terminable fee.⁴ The lease of a railroad bridge and its appurtenant real estate by the constructing company to a railroad company and "its successors and assigns, forever," made upon conditions which may terminate the lease at any time upon default, is not a lease in perpetuity, and leaves the ownership of the property in the lessor. No lease, for however long a period, accompanied with conditions of defeasance or forfeiture, can be equivalent to an absolute deed of conveyance.⁵ On a lease in perpetuity, a judgment for possession terminates the lease. If it fixes the amount of rent in arrears, that simply bears upon the lessee's right of redemption.⁶]

§ 75. **Term to be fixed. — How ascertained. —** The continuance of a term of years constitutes an essential part of the

¹ *Folts v. Huntley*, 7 Wend. 210; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Wallace v. Harmstad*, 44 Pa. St. 492; *Phila. Lib. Co. v. Beaumont*, 39 *id.* 43.

² *White v. Fuller*, 38 Vt. 193.

³ *Arms v. Burt*, 1 Vt. 306. But where the words "or as long as we selectmen have a right to lease" are added, the lease is good only for five years, that being the extent of their power to lease. *Lemington v. Stevens*, 48 Vt. 38.

⁴ *Delhi School Dist. v. Everett*, 52 Mich. 314. Per Cooley, J.

⁵ *State v. Bridge Co.*, 109 Mo. 253; *St. Louis, &c. Co. v. Williams*, 53 Ark. 58; *Cass County v. R. R. Co.*, 25 Neb. 348; *Bridge Co. v. Allen County*, 88 Ill. 615; *State v. Metz*, 29 N. J. L. 122; *Chic. & Alton R. R. Co. v. The People*, 153 Ill. 409.

⁶ *Van Rensselaer v. Wright*, 121 N. Y. 626.

contract, and must be ascertained with certainty; otherwise, the lease will create but a tenancy at will or from year to year, if it be not wholly void. As if it be to hold until a child, then unborn, shall be of full age; or so long as a certain individual shall continue parson of Dale; this will, in either case, constitute only a tenancy at will, because of the uncertainty that the child will ever arrive at that age, or that the individual named will continue parson of Dale.¹ But the duration of a lease may be defined, either by an express enumeration of years, or by reference to some collateral or extrinsic circumstance;² or it may be made certain by matter *ex post facto*. Thus, if it is intended to grant a term for years to be dependent for its continuance upon the duration of a life, it must be granted for a stated term of years, if the life shall so long continue; as for the term of ninety-nine years if a certain person shall live so long; for there the utmost limit of the term is marked out, subject to its sooner determination by a collateral event. And although formerly there could be no remainder of a term after a life-estate therein, it was afterwards settled that the unexpired residue of the term, taken in the sense of time, might be limited over on the decease of a life-tenant. But it may be granted to a man for life; and a subsequent lease may be granted to another for sixty years, to commence after the decease of the first, or to commence immediately, and run in computation of time concurrently with the first term, subject to postponement, as to possession, until the decease of the first person.³ A grant, however, for the life of one

¹ Bishop of Bath's Case, 6 Co. 85. In *Murray v. Cherrington*, 99 Mass. 229, a lease with no other termination indicated than that the lessor was to have the right to reoccupy after two years, was held void as a lease, and to enure only as a tenancy at will. And see § 60, *ante*.

² *Horner v. Leeds*, 1 Dutch. 106. Where the years are expressed, the words "expiration of the term," refer to the expiration of the period of years, and liabilities to accrue at the expiration of the term do not attach until the end of the term as limited, although the lessee's estate may be sooner determined. *Finkelmeier v. Bates*, 16 N. Y. S. C. 438, 92 N. Y. 172; and see *Crosby v. Moses*, *id.* 634.

³ *Shep. Touch.* 274; *Wright v. Cartwright*, 1 Burr. 282; *Rector of Chedington's Case*, 1 Co. 155, a.

not in existence, is void; but if for the lives of A., B., and C., and there should be no such person as C., it is good for the lives of A. and B.¹

§ 76. **Ascertained by Extrinsic Reference.** — The duration of a lease may, as we have said, be defined by reference to a certainty; as, for instance, to another lease already in existence, as a lease to A. for so many years as B. has in the manor of Dale. But such a reference must be to a thing which has express certainty at the time the lease is made, and not to a mere possibility of casual certainty. As where a lease is made for so many years as a man shall continue parson of Dale, this cannot be made certain, for nothing can be less certain than the time of his death, or the period of his ceasing to be parson.² Yet a lease which does not fix the exact period at which the tenancy is to end, may be sufficient for the particular time in it which is certain.³ So a term may be demised subject to a contingent sooner determination of it by a collateral event, as by the exercise of the right of eminent domain;⁴ or by the lessor's selling the property;⁵ or by any similar condition.⁶

¹ Doe v. Edwards, 1 M. & W. 553. Care should be observed in the use of the particles *and* and *or*; for a lease for ninety-nine years, if A. and B. so long live, is determinable by the death of either A. or B.; but a lease, if A. or B. so long live, lasts till the death of the survivor of them. Vaux's Case, Cro. El. 269; Elliott v. Turner, 2 C. B. 461.

² Bishop of Bath's Case, 6 Co. 34, b; Co. Lit. 45, b.

³ Gwynne v. Mainstone, 3 C. & P. 302. A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years. Ferguson v. Cornish, 2 Burr. 1032. It is for the longest period, determinable at either of the earlier dates. Goodright v. Richardson, 3 T. R. 463, n. A lease for twenty-one years, determinable at the end of seven or fourteen, if the parties so think fit, is not determinable without the joint assent of both parties. Fowell v. Tranter, 3 H. & C. 458.

⁴ Munigle v. Boston, 3 Allen, 280.

⁵ Knowles v. Hull, 97 Mass. 206; Shaw v. Appleton, 161 Mass. 313.

⁶ Shaw v. Hoffman, 25 Mich. 162; Flagg v. Drew, 99 Mass. 18; Cook v. Bisbee, 18 Pick. 527. So may a tenancy at will. Ashley v. Warner, 11 Gray, 43; Thurber v. Dwyer, 10 R. I. 355. And a lease given during the absence of the owner from the country, by an agent having authority to take charge of the land and to make it pay the best way he could, was

§ 77. **Ascertained by Matter ex post facto.** — A term originally uncertain may be rendered certain by matter *ex post facto*. Thus it may be granted for so many years as a particular person shall name; and the lease, although uncertain, will be valid after the naming of the years.¹ A demise, “not for one year only, but from year to year,” constitutes a tenancy for two years, at least, and is not determinable by a notice to quit at the expiration of the first year.² Or if a man makes a lease for years, without saying how many, it is good for two years; for more than this there is no certainty, and for less there can be no sense in the words.³ But a lease to hold from the first day of April, from year to year, so long as the parties agree, is not necessarily a lease for more than one year;⁴ but if it be from year to year, so long as the tenant pays rent or the landlord has power to let, it is void.⁵ In the city of New York, if no time is agreed upon as to its duration, it is to continue until the first day of May next after possession commenced; and the rent is payable at the usual quarter-days for the payment of rent in that city, unless otherwise expressed in the agreement.⁶ If a lease is made for a month or months, calendar months are usually intended.⁷ But, by the English law, a month means

held to be terminable by the owner on his return. *Antoin v. Belknap*, 102 Mass. 193.

¹ *Goodright v. Richardson*, 3 T. R. 463.

² *Denn v. Cartright*, 4 East, 29.

³ *Bac. Abr. Leases* (L.), 3.

⁴ *Fox v. Nathans*, 32 Conn. 351.

⁵ *Wood v. Beard*, 2 L. R. Exch. Div. 30. Where the lease is until the landlord can sell the premises, it ends upon such sale, and notice to quit is unnecessary. *Clark v. Rhodes*, 79 Ind. 342. So where the letting is until the tenant can find another place. *Hoffmann v. McCollum*, 93 *id.* 326.

⁶ 1 R. S. 744, § 1. The statute does not apply to a case where a tenant enters without any agreement as to the terms of hiring, and remains for a series of years, paying rent monthly in advance, it being in such a case a monthly hiring. *Wilson v. Taylor*, 8 Daly, 253.

⁷ 1 N. Y. R. S. 606, § 4; 1 Hill, Abr. 118, n.; *Avery v. Pixley*, 4 Mass. 460; *Hardin v. Major*, 4 Bibb, 105; *Gross v. Fowler*, 21 Cal. 392; *Strong v. Birchard*, 5 Conn. 361; *Brewer v. Harris*, 5 Gratt. 298; *Sheets v. Selden*, 2 Wall. 177.

a lunar month of twenty-eight days, or four weeks; and a lease for twelve months has therefore been held to be for forty-eight weeks only.¹

§ 78. **Terminal Days, Rule as to.** — It was formerly held, by a strict construction of words, that a lease “from the day of the date” excluded, while a lease “from the date” included the first day, in point of computation;² or, as the rule is sometimes stated when the computation is “from” a day, that day is to be excluded, but when “from” an act, the day of the act is included.³ The first rule was qualified in later cases, and the day was included whenever its exclusion would produce a forfeiture or estoppel; or defeat the clear

¹ 2 Bl. Com. 141; 6 T. R. 224; *Stackhouse v. Halsey*, 3 Johns. Ch. 74; *Parsons v. Chamberlin*, 4 Wend. 512; *People v. Mayor*, 10 *id.* 393; *Simpson v. Margitson*, 11 Q. B. 23; *Rogers v. Hull Dock Co.*, 11 L. T. N. S. 42, 463; 10 Jur. N. S. 1245. A distinction has been held between twelve months and a twelvemonth; and the latter has been held to mean a year. *Catesby's Case*, 6 Co. 61. Calendar months are those of the Gregorian calendar. The computation by lunar months was used by the Greeks and Romans, and was probably introduced into the English common law from the code of Justinian.

² *Clayton's Case*, 5 Co. 1; *Hatter v. Ash*, 1 Ld. Ray. 84; Co. Lit. 46, b; the word *datus* signifying delivery; but *datus*, or date, now means day. *Styles v. Wardle*, 4 B. & C. 908; *Johnson v. Stewart*, 11 Gray, 181. Where no other time is fixed for the lessee's interest to begin, it will begin from the date of the lease. *Keyes v. Dearborn*, 12 N. H. 52; *Sidebotham v. Holland*, 1895, 1 Q. B. 378. But a lease may commence from one date in point of interest, and another in point of computation. *Enys v. Donnithorne*, 2 Burr. 1190; *Crusoe v. Bugby*, 3 Wils. 234. In this case the *term* only begins when the interest vests. Thus, where the lease was to cease if any accident occurred during the term, and was to commence June, 1851, but was not actually executed until November, 1852, an accident which occurred in September, 1851, was held not within the term. *Jervis v. Tomkinson*, 1 H. & N. 195.

³ *Blake v. Crowninshield*, 9 N. H. 304; *Ewing v. Bailey*, 4 Scam. 420; *Castle v. Burditt*, 3 T. R. 623. Where a lease demised a term of years “from the first day of September now next ensuing,” and reserved a rent payable “by equal quarter-yearly payments,” the first payment “to be made on the first day of December now next ensuing,” it was held that the rent, though payable December 1, was not legally due, and consequently not subject to garnishment, until after midnight of December 1. *Ordway v. Remington*, 12 R. I. 319.

intention of the parties apparent from other portions of the instrument;¹ or where some local custom controlled.² But if no such reasons existed the day was excluded.³ And as the rule is now generally laid down, one terminus will be excluded and the other included, in the computation of time, according to the circumstances and the apparent intention of the parties.⁴

§ 79. **Conflicting Authority as to.** — The second rule above stated has not been so generally followed. It seems, however, to be law in several of the States,⁵ while in others, in the Federal courts and probably in England, after some conflict of decisions, it has been rejected.⁶ Generally, where

¹ *Pugh v. Leeds*, Cowp. 714; *Lester v. Garland*, 15 Ves. 248; *Windsor v. China*, 4 Greenl. 298; *Sims v. Hampton*, 1 S. & R. 411; *Bennet v. Nichols*, 4 T. R. 121; *Wilkinson v. Gaston*, 9 Q. B. 137; *Pellew v. Wonford*, 9 B. & C. 134; *Sands v. Lyon*, 18 Conn. 30; *People v. Robertson*, 39 Barb. 9.

² See *Wilcox v. Wood*, 9 Wend. 346; *Fox v. Nathans*, 32 Conn. 348; *Marys v. Anderson*, 24 Pa. St. 272; *Duffy v. Ogden*, 64 *id.* 240; *McGowan v. Lennest*, 1 Brewst. 397; *Butler v. Fessenden*, 12 Cush. 78, as explained in *Bemis v. Leonard*, 118 Mass. 502.

³ *Bigelow v. Willson*, 1 Pick. 485; *Wiggin v. Peters*, 1 Met. 127; *Atkins v. Sleeper*, 7 Allen, 487; *Rand v. Rand*, 4 N. H. 267, 276; *Bemis v. Leonard*, *supra*; *Sheets v. Selden*, 2 Wall. 190; *Isaacs v. Roy. I. Co.*, L. R. 5 Exch. 296; *Styles v. Wardle*, 4 B. & C. 908; *Pellew v. Wonford*, 9 *id.* 134; *Ackland v. Lutley*, 9 Ad. & E. 879; *Webb v. Fairmaner*, 3 M. & W. 473; *Gorst v. Lowndes*, 11 Sim. 434.

⁴ *Farwell v. Rogers*, 4 Cush. 460; *Cornell v. Moulton*, 8 Denio, 12; *Judd v. Fulton*, 10 Barb. 117; *Sheets v. Selden*, *supra*; *Higgins v. Halligan*, 46 Ill. 173; *Duffy v. Ogden*, *supra*. Thus "between" as a rule excludes. *Atkins v. Boyls. I. Co.*, 5 Met. 439. But where rent was payable on the first of each month, an assignment August 31st of all rents until October 1st was held to include the rent due on that day. *Kendall v. Kingsley*, 120 Mass. 94; *Isaacs v. Roy. I. Co.*, *supra*. The distinction has been attempted that where an interest is to pass the day of the date is included. 4 Kent, Com. 95, note a; *Lysle v. Williams*, 15 S. & R. 135; *Donaldson v. Smith*, 1 Ashm. 197; but see *contra*, *Farwell v. Rogers*, 4 Cush. 460.

⁵ See *Blake v. Crowninshield*, 9 N. H. 304; *Jacobs v. Graham*, 1 Blackf. 392; *Ewing v. Bailey*, 4 Scam. 420; *Thomas v. Afflick*, 16 Pa. St. 14; *Batman v. Megowan*, 1 Met. Ky. 533; *Huffman v. Daniel*, 1 Or. 250.

⁶ See *Sands v. Lyon*, 18 Conn. 18; *Weeks v. Hull*, 19 *id.* 376; *People*

the words of computation distinctly refer to the end of the period in question, the day will be included or excluded according to the rules just laid down.¹

§ 80. **Void Parol Lease may regulate Duration of Tenancy.** — Although a lease by parol may be void, as exceeding the period allowed by the Statute of Frauds, or the tenancy may, according to circumstances, be construed at will, or [perhaps] from year to year, it will nevertheless be governed, in respect to its termination as well as to its other incidents, by the terms of the demise,² and will expire at the time limited by those terms without notice to quit.³ It may also be determined under a proviso for re-entry, to be implied from that or the original lease.⁴ [It has been held, and, apparently on sound reasons, that the mere fact that one goes into possession under a lease for more than one year, void under the Statute of Frauds, does not create a yearly tenancy, the lease vests no term whatever, and in the absence of any other agreement, express or implied, the tenancy is at will.⁵]

v. N. Y. C. R. R., 28 Barb. 284; *Hunter v. Sav. C. S. Min. Co.*, 4 Nev. 153; *Bemis v. Leonard*, where all the cases are elaborately reviewed, and the dictum in *Atkins v. Sleeper*, 7 Allen, 487, overruled; *Sheets v. Selden*, 2 Wall. 190, overruling *Arnold v. United States*, 9 Cranch, 104; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Lester v. Garland*, 15 Ves. 248; *Webb v. Fairmaner*, 3 M. & W. 473; *Regina v. Middlesex*, 7 D. & L. 107. The early cases, *Rex v. Adderly*, Doug. 463; *Castle v. Burditt*, 3 T. R. 623; *Glassington v. Rawlins*, 3 East, 407, depended each on special circumstances, and established no general rule.

¹ *Small v. Edrick*, 5 Wend. 137; *Wiggin v. Peters*, 1 Met. 127.

² *Evans v. Winona Land Co.*, 30 Minn. 515; *Steele v. Anheuser-Busch Brewing Ass'n*, 57 *id.* 18 (but see criticism of the rule in *Johnson v. Albertson*, 51 *id.* 333); *Nash v. Berkmeier*, 83 Ind. 536; *Coan v. Mole*, 39 Mich. 454; *Hammond v. Dean*, 8 Baxt. 193.

³ *Berry v. Lindley*, 3 M. & G. 514; *Doe v. Moffatt*, 15 Q. B. 257; *Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 Ellis & B. 36; *Creech v. Crockett*, 5 Cush. 133; *Elliott v. Stone*, 1 Gray, 574; *Marr v. Ray*, 151 Ill. 340; *Trust Co. v. Garbutt*, 6 Utah, 342; *Martin v. Smith*, L. R. 9 Exch. 50.

⁴ *Thomas v. Packer*, 1 H. & N. 669; *Hayne v. Cumming*, 16 C. B. N. s. 421.

⁵ *Reeder v. Snyder*, 70 N. Y. 184; *Laughran v. Smith*, 75 *id.* 209; *Talamo v. Spitzmiller*, 120 *id.* 37. See also *Adams v. Cohoes*, 127 *id.* 37.

§ 81. **Optional Duration refers to Tenant's Option.** — If the duration of a tenancy is left optional by the terms of the lease, without saying at whose option, — as, for instance, if a lease be made for seven, fourteen, or twenty-one years, — it means at the option of the tenant, who has the right of choosing whether he will put an end to the lease at the end of seven years, or continue it for fourteen or twenty-one years.¹ [So where a demise was for six months, with a proviso that rent for the next following six months should be in advance, the acceptance of the demise for this latter period was held to be at the tenant's option.² But where the tenancy is made determinable "if both parties think fit," both must concur in order to determine it.³] In cases of uncertainty, the tenant is most favored, because the landlord, having the power of stipulating in his own favor, has neglected to do so; and also upon the principle that every man's grant is to be taken most strongly against himself.⁴

§ 82. **Tenancy from Year to Year determinable by Notice.** — It was formerly held that the effect of a lease "from year to year so long as both parties please," was, to create a tenancy for at least two years;⁵ but now it is held that a tenancy from year to year lasts only so long as both parties please and is determinable by either party, at the end of the first or any other year, by giving the usual notice to quit;

¹ *Dann v. Spurrier*, 3 B. & P. 399; *Goodright v. Richardson*, 3 T. R. 462; *Doe v. Dixon*, 9 East, 15; *Goodright v. Mark*, 4 Maule & S. 30; *Fallon v. Robins*, 16 Ir. Eq. 422; *McMill v. Sheriff*, 3 Brewst. 537; *Nindle v. State Bank*, 13 Neb. 245.

² *Commonwealth v. McNeill*, 8 Phila. 438.

³ *Fowell v. Trantor*, 3 H. & C. 458; *Brown v. Trumper*, 26 Beav. 11. See § 332, *post*.

⁴ *Doe v. Dixon*, 9 East, 15; *Folts v. Huntley*, 7 Wend. 214; *Sweetser v. McKenney*, 65 Me. 225. A letting to a yearly tenant providing that at the lessor's option the lessor will lease for seven, fourteen, or twenty-one years, at the same rent, is sufficiently certain and is to be construed an optional lease for twenty-one years, determinable at the end of seven or fourteen years, at the option of the tenant. But the landlord may call upon the tenant to exercise his option, and, in default, may determine the tenancy. *Hersey v. Giblett*, 18 Beav. 174.

⁵ *Agard v. King*, Cro. El. 775; *Birch v. Wright*, 1 T. R. 380.

unless it appears that in the creation of the tenancy, the parties contemplated a tenancy for at least two years.¹ But where the words were, "for one year from the date hereof, and so on from year to year, until the tenancy hereby created shall be determined, as after mentioned," with a subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice to the other; it was held that the tenancy was not determinable by a notice expiring before the end of the second year; since the language of the contract clearly contemplated a term to continue longer than one year.² Where a lease is made determinable before its regular expiration, at the option of the lessee, by giving six months' notice, it is advisable for the lessor to make that option conditional upon payment of rent due to the period of determination and the performance of the lessee's covenants; for this being a condition precedent, the tenant will thereby be prevented from putting an end to the lease, leaving the charges upon the property unpaid and the premises in a dilapidated state.³

§ 83. **Lease to exceed Lessor's Term void in Law but valid in Equity.**—In general, a deed which will not convey all that was intended will be upheld as a transfer of all that it was in the power of the grantor to convey;⁴ and our law may be considered as having extended the English rule on this subject, which held that if a man has power to lease for ten years, and leases for twenty, the lease is bad at law but good in equity for the ten years; operating as an execution of a

¹ *Doe v. Smaridge*, 7 Q. B. 957; *Fox v. Nathans*, 32 Conn. 348; *Doe v. Mainby*, 10 Q. B. 473.

² *Doe v. Green*, 9 Ad. & E. 658; *Regina v. Chawton*, 1 Q. B. 247. So *Wharton v. Kelly*, 14 Ir. C. L. 293, where the premises were let "for one year certain," and rent quarterly in "each and every year during the tenancy," with certain allowances "during the first four quarters." A lease for one year, and so for two or three years, as the parties shall agree, means for two years; and after a year begins, is not determinable till it is ended. *Harris v. Evans*, 1 Wils. 262, in equity, Amb. 329. But without such subsequent agreement, it is a lease for one year only. *Ibid.*

³ *Porter v. Shephard*, 6 T. R. 665.

⁴ *Law v. Hempstead*, 10 Conn. 23; *Martin v. Sterling*, 1 Root, 210.

power.¹ Thus a devise of lands to an executor, for the payment of the debts of the testator, or until his debts are paid, or a particular sum is raised from the profits of the estate, was held to create an estate for so many years only as should be found necessary to raise the required sum.² No man may grant a lease to continue beyond the period at which his own estate is to determine; but trustees who have a fee, though determinable, may grant a lease valid at law, although it is to continue after their estate is determined. But equity can annul such a lease if unreasonable or improvident.³ A lease under a power takes effect out of the estate of the donor of the power, and is not limited to the life of the donee.⁴

¹ *Roe v. Prideaux*, 10 East, 158; *Taylor v. Horde*, 1 Burr. 120.

² *Corbet's Case*, 4 Co. 81, b; *Carter v. Barnardison*, 1 P. Wms. 509-518.

³ *Greason v. Keteltas*, 17 N. Y. 491.

⁴ *Sugd. Pow.* ch. 7, sect. 8, § 11.

CHAPTER IV.

THE CONTRACTING PARTIES.

§ 84. **Who may grant Leases.** — Persons seised or possessed of lands or tenements may grant leases thereof for a period commensurate with their respective interests; except such as are under legal disability and whom the law supposes incapable of entering into a contract. It is further to be observed, that every conveyance of land is void, if, at the time of its delivery, the land shall be in the actual possession of one claiming under a title adverse to that of the grantor. If, however, the lessor is in possession at the time of making a lease, he will be deemed to have the right of possession, as to all persons holding under him; but without such possession, he cannot make a valid lease; for a bare right of entry is but a *chose in action*, and is not assignable.¹ If he has actual possession, although it may have been obtained tortiously, as by a mere disseisor, he may make a lease, which can only be avoided by one having a paramount title.²

¹ *Iseham v. Morrice*, Cro. Car. 109. Any one having a right of entry on land may convey. *Price v. Pierce*, 36 Me. 148. To constitute an adverse possession, it must be under a claim of a specific title. *Crary v. Goodman*, 22 N. Y. 170. And where an occupant of land produces no written title, but relies solely on possession with an assertion of title, he can retain only so much as he had under actual improvement and within a substantial enclosure. *Jackson v. Warford*, 7 Wend. 62; *Monro v. Merchant*, 26 Barb. 383, 404; *Sherry v. Frecking*, 4 Duer, 452. By the Statute of Frauds, a parol gift of land in fee creates a tenancy at will only; and, if the donee makes a lease, it is void and cannot be made valid by any subsequent assent of the donor. *Jackson v. Rogers*, 1 Johns. Cas. 33; *Doe v. Watts*, 7 T. R. 85; *Jenkins v. Church*, Cowp. 482; *Doe v. Butcher*, Doug. 50.

² Bac. Abr. Leases (I.), 4; *Lee v. Norris*, Cro. El. 331; *Thurston's Case*, Owen, 16; *Mayowe's Case*, 1 Co. 147 (a). Possession is the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name, and the enjoyment

§ 85. **Lessor's Possession essential.** — Rule modified as to **Mesne Lessee, Heir, and Vendee.** — Possession is so important to the validity of a lease that if a disseisee wishes to lease land of which he is disseised, he can only deliver the deed as an escrow to take effect after he recovers possession. The deed will not operate before entry further than to transfer the lessor's right of entry, to take effect after his entry.¹ But this rule applies only to the original parties, for a lessee for years, having an *interesse termini*, may make a good lease of part, or an assignment of the whole of his term, before he enters on the demised premises.² And if a man dies, and his heir, before entry, makes a lease of the land which descended to him, this is a good lease, for he is seised in law although not in fact. But if a stranger had entered and abated into the land, and then the heir had made the lease, it would have been bad; for it would have been made after a disseisin.³ The possession of a tenant for life, however, is not adverse to that of the remainder-man, and hence the latter may make a valid lease notwithstanding such possession.⁴ A defaulting vendee may make a lease of the land purchased, and receive rent thereunder, which lease will continue valid until the sale is necessarily exclusive. *Redfield v. Utica & S. R. R.*, 25 Barb. 54. A disseisin is an estate gained by wrong and injury; and therein differs from a dispossession, which may be right or wrong. A mere entry upon another is not a disseisin unless there is an expulsion from the freehold; and a peaceable entry upon land apparently vacant furnishes, *per se*, no presumption of wrong. *Smith v. Burtis*, 6 Johns. 197; *Varick v. Jackson*, 2 Wend. 166; Co. Lit. 8, b; 18, b.

¹ *Doe v. Watts*, 9 East, 19; *Jennings v. Bragg*, Cro. El. 447; *Sharp v. Sharp*, *id.* 483; Co. Lit. 48, b. The rule that avoids every conveyance of land which is held adversely at the time of the conveyance does not apply to a lease made by the State; for there can be no adverse possession as against the people. *People v. Mayor*, 28 Barb. 240.

² Plowden, 133-142; Co. Lit. 46, b; Cro. Jac. 60.

³ *Shep. Touch.* 269. See 2 R. S. of N. Y., 294, § 11; Code of Pro., § 84.

⁴ *Grout v. Townsend*, 2 Hill, 554; *Doe v. Brown*, 2 Ellis & B. 331. The possession of a tenant in common law, however long continued, is not, if unaccompanied with a claim of entire title, adverse to the cotenants. *Smith v. Burtis*, 9 Johns. 174; *Thompson v. Mayor*, 11 N. Y. 115. But it is otherwise if he actually excludes his cotenant. *Northrop v. Wright*, 24 Wend. 221; *Humbert v. Trinity Ch.*, *id.* 587; *Butler v. Phelps*, 17 *id.* 642; *Sherry v. Frecking*, 4 Duer, 452.

is rescinded; but such a lease will give the tenant no right of possession after he has received notice of a rescission of the contract of sale.¹

§ 86. **Owner's Possession presumed. — Undisputed Right of, Sufficient.** — Possession will always be considered as following the ownership unless there is an adverse possession. And an actual seisin will be presumed to continue although the premises may appear to be vacant.² At common law, no interest in land could pass before the vendor had obtained possession, by livery of seisin; but by the Statute of Uses, the possession was transferred in all cases to the use of the *cestui que use*, who may now, if there is no adverse possession, make a lease for years without actual entry.³ It is enough that a lessor has a right of possession at the time of making his lease; and if at that time he has an undisputed reversion, his lease will be a good charge upon the reversion and will take effect in interest and possession if the reversion be reduced into possession during the period limited by the contract for the enjoyment of the land; the lessor in such case being estopped by his deed from saying that he did not demise the premises.⁴

¹ Jones v. Hutchinson, 2 Tex. 370.

² Fosgate v. Herkimer Manuf. Co., 9 Barb. 287; s. c. 12 *id.* 352. But where a grantor, after conveyance, remains in possession, it is not as owner, but as tenant to the grantee, and nothing but a clear, unequivocal, and notorious disclaimer of the latter's title can render the possession adverse. Jackson v. Burton, 1 Wend. 341; Swart v. Service, 21 *id.* 36. And see Butler v. Phelps, 17 Wend. 642.

³ Bellingham v. Alsop, Cro. Jac. 52; Dymmok's Case, *id.* 408; Harvy v. Thomas, Cro. El. 216. A tenant holding over and claiming as owner with the knowledge of the landlord may acquire title by adverse possession. Meridian Land Co. v. Ball, 68 Miss. 135. In North Carolina, a tenant who holds continuous, open, notorious, and unequivocal adverse possession of a definite boundary, however small, in a large tract of land, holds possession for his lessor, and his possession enures to the benefit of the lessor as to the whole of the land covered by the deed under which he claims title. Scaife v. West. North Carolina Land Co., 61 U. S. App. 647.

⁴ Russell v. Doty, 4 Cow. 576; Kinsman v. Greene, 16 Me. 60; Milford v. Fenwick, And. 288; s. c. Moor, 284; Bould v. Winston, Cro. Jac. 168; Sutton's Case, Cro. El. 140. It has been held in Pennsylvania that

§ 87. **Present Inoperative Leases operate by Estoppel.** — Although a lessor may have no title to the land which he undertakes to demise, or may be a disseisor, his lease will still operate by way of estoppel if he comes into possession, by purchase or descent, at any time before the expiration of the term.¹ [This is upon the general principle that if a man conveys land which is not his and afterwards purchases the land, he is bound by his deed, and will not be permitted to aver that he had nothing; and the stranger to whom he sells will be equally estopped.²] But as estoppels are not generally favored, and will not be permitted to defeat an estate if it can be avoided, there will be no estoppel if some interest actually passed by the lease, though the interest purported to have been granted is really greater than the lessor had, at the time, power to grant. Thus, if a lessee for the life of B. makes a lease for years and then purchases the reversion in fee, after which the *cestui que vie* dies, the lessor may avoid this lease although several of the years therein expressed are still to come; for he may confess and avoid the lease, which took effect in point of interest, and determined on the death of B.³ So if two join in a lease and one only has any interest in the premises, it will enure by way of confirmation from the other, and not by way of estoppel.⁴ [But the estoppel operates as against a lessor owning the equitable title to the leased premises at the time of the lease, and afterwards acquiring the legal title.⁵]

a purchaser at a sheriff's sale who has not received his deed cannot make a valid lease. *Hall v. Benner*, 1 Penn. 402.

¹ *Jackson v. Murray*, 12 Johns. 201; *Sinclair v. Jackson*, 8 Cow. 543; *Jackson v. Stevens*, 16 Johns. 110; *Cocke v. Brogan*, 5 Pike, 693; *Jackson v. Bradford*, 4 Wend. 619; *Austin v. Ahearne*, 61 N. Y. 6; *Lewis v. Brandle*, 107 Mich. 7; *Co. Lit.* 47, 227; *Hermitage v. Tomkins*, 1 Ld. Ray. 729; *Webb v. Austin*, 7 M. & G. 701; *Whitton v. Peacock*, 2 Bing. (N. C.) 411.

² *Co. Lit.* 45, a; 47, b; 852, a, b; *Rawlyn's Case*, 4 Co. 58, a; *Iseham v. Morrice*, Cro. Car. 110; *Luxton v. Stephens*, 8 P. Wms. 378; *Jackson v. Bull*, 1 Johns. Cas. 81; *Somes v. Skinner*, 8 Pick. 52.

³ *Leicester v. Rehoboth*, 4 Mass. 180; *id.* 278; *Jackson v. Hoffman*, 9 Cow. 271; *Co. Lit.* 47, b; *Anon. Ventr.* 358; *Brown v. McCormack*, 6 Watts, 60; *Bush v. Cooper*, 18 How. 82.

⁴ *Brereton v. Evans*, Cro. El. 700.

⁵ *Skidmore v. Railway Co.*, 112 U. S. 88, in which case the rule was

§ 88. **Successive Leases.** — **Estoppel applied to.** — Where a lease for years cannot take effect immediately, by reason of a prior lease of the same premises, the second lease will operate presently by estoppel, for so much of the term as may be left after the determination of the former lease, by way of passing an interest.¹ A grantor by deed is always estopped from saying he had no interest, unless he is a trustee for the public, deriving his authority from an act of the legislature;² but if it appears, from recitals in the lease, that he had no interest at the time of the demise, and he afterwards purchases the land, it will not enure to the lessee by estoppel.³ He is, however, always estopped from contending that he had merely an equitable, and not a legal estate when he granted the lease.⁴

§ 89. **Tenant's Estoppel.** — The estoppel of a tenant to deny his landlord's title, though belonging to a different topic than the creation of a demise, and fully discussed hereafter,⁵ may be noticed here in view of considerations equally applicable to both kinds of estoppel. This estoppel was unknown to the common law,⁶ and is an estoppel *in pais*.⁷ It had its origin in the early part of the last century, and probably from the features of the action of *assumpsit* for use and occupation.⁸ The only tenant's estoppel known when Coke wrote was that arising strictly by indenture, the peculiarities of which instrument gave rise to most of the rules then in force.⁹ Thus it was a principle that an estoppel would not bar a lessee beyond the duration applied against a judgment creditor of the lessor whose judgment was subsequent to the lease.

¹ *Gilman v. Hoare*, 1 Salk. 275.

² *Fairtitle v. Gilbert*, 2 T. R. 169.

³ *Hermitage v. Tomkins*, 1 Ld. Ray. 729.

⁴ *Green v. James*, 6 M. & W. 656, and see *Skidmore v. Railway Co.*, 112 U. S. 38.

⁵ §§ 705–707, *post*.

⁶ *Delaney v. Fox*, 2 C. B. N. S. 768.

⁷ The only estoppels *in pais*, in Coke's day, were entry, livery, partition, and acceptance of rent or an estate. Of these all but the last are obsolete. Bigelow, *Estoppel*, 846 (2d ed.).

⁸ Bigelow, *Estoppel*, 850 (2d ed.).

⁹ *Ibid.*; *Moffatt v. Strong*, 9 Bosw. 57, 65.

tion of the interest which he derived under the lease; and so if a man took a lease for years, by deed indented of his own land, it was no conclusion beyond the term, at the end of which the lessor might enter and occupy the land; for, by the determination of the term, the estoppel was also determined.¹ But the tenant's estoppel is now no longer thus restricted, as it is founded on possession and not on the instrument of demise,² and is as operative after the conclusion of the lease as before, and until that possession ceases.³ It is only where there is fraud or mistake, in consequence of which one takes a lease of his own land, that he will not be estopped to show this on the termination of the lease.⁴

§ 90. **Mutual Estoppel.** — It was a rule of the common law that all estoppels should be reciprocal and mutual;⁵ but this rule was derived from and limited to leases created by indenture or record.⁶ A deed poll, or even an indenture if not executed by both parties, could not create an estoppel.⁷ But this rule is no longer unqualified, and a lessor by estoppel is bound by his demise, although the tenant may elect whether or not to take the term when it accrues; and, on the other hand, a tenant is concluded from denying the landlord's title, although the counter obligations upon the landlord to deliver and permit peaceable possession rest in contract only and are in no sense estoppels. Thus, even when the lessor is under a disability, such as infancy or coverture, so that the lease is voidable, the lessee is estopped until it is avoided.⁸

¹ *Rawlyn's Case*, 4 Co. 54, a; *James v. Landon*, Cro. El. 36. And see *Page v. Kinsman*, 48 N. H. 328.

² *Bigelow, Estoppel*, 350 (2d ed.).

³ § 705, *post*; *Binney v. Chapman*, 5 Pick. 124; *Doe v. Skirrow*, 7 Ad. & E. 157.

⁴ § 707, *post*, notes, and cases cited.

⁵ Co. Lit. 352.

⁶ Co. Lit. 363, b; *Pike v. Eyre*, 9 B. & C. 909; *Wright v. Douglass*, 10 Barb. 97.

⁷ *Hill v. Saunders*, 2 Bing. 112; *Cardwell v. Lucas*, 2 M. & W. 111; *Wilson v. Woolfryes*, 6 M. & S. 841.

⁸ *Russell v. Irwin*, 38 Ala. 44; *Gran v. White*, 42 Mo. 285; *Welland Canal v. Hathaway*, 8 Wend. 480; *Prevost v. Lawrence*, 51 N. Y. 219.

§ 91. **Estoppels run with the Land.** — An estoppel is not confined in operation wholly to the parties to the lease; being annexed to the estate, it runs with the land and is binding on all persons claiming under them. The heir of the reversioner, being privy in blood and taking the estate subject to the burdens imposed on his ancestor, is bound wherever the ancestor, leaving no estate in the premises or only a contingent remainder, makes a lease by indenture, and afterwards purchases the fee of the land demised, and dies.¹ But the heir will not be bound unless he claims the land from him who created the estoppel; for if he purchases the reversion, or if it devolves upon him by descent from another ancestor, he will not be bound.² Nor will he be bound in such a case unless the estoppel would have operated upon the inheritance in the hands of his ancestor; and, therefore, if tenant for life makes a lease for years, and afterwards purchases the reversion and dies within the term, his heir may enter; for a freehold being a greater estate than any term of years, the decease of the tenant for life, out of whose estate the lessee's interest arose, is by law the point of time fixed for the determination of the lease.³ Privies in estate are also bound when a man makes a lease, by indenture, of property to which he has no title, and afterwards, becoming its owner in fee, disposes of it to another; for the purchaser will be estopped from disputing the lease.⁴

§ 92. **Rule of Assignees' Estoppel obsolete.** — It was formerly considered that the assignees respectively of the lessor or lessee by estoppel could not maintain an action on the covenants of the lease against the other party thereto.⁵ This rule, which was limited in its application to the technical action

¹ *Webb v. Austin*, 7 M. & G. 701; *Weale v. Lower*, Pollexf. 54; Co. Lit. 352, a.

² *Edwards v. Rogers*, W. Jo. 460; *Goodtitle v. Morse*, 3 T. R. 371.

³ *Treport's Case*, 6 Co. 15, a; Co. Lit. 47, b; *Blake v. Foster*, 8 T. R. 487; *Carvick v. Blagrove*, 1 Br. & B. 531.

⁴ *Trevivan v. Lawrence*, Holt, 282; *Webb v. Austin*, *supra*; *Sturgeon v. Wingfield*, 15 M. & W. 324.

⁵ *Noke v. Awder*, Cro. El. 436; *Whitton v. Peacock*, 2 Bing. (N. C.) 411; *Carvick v. Blagrove*, 1 Br. & B. 531.

of covenant¹ and to estoppel by deed,² turned strictly on the rules of special pleading; and, where this system was not in force, the estoppel arose without being pleaded.³ The doctrine is now overruled.⁴

SECTION I.

LEASES BY AND TO INFANTS.

§ 93. **Voidable, and when.** — A minor cannot make a lease to bind him when he arrives at full age;⁵ the rule being well settled, that all contracts except for necessities made by a minor, including his deeds and other instruments under seal, are voidable; that is, he may disavow and so annul them, either at or before his majority or within a reasonable time after it.⁶ But if he makes a lease rendering rent, this passes an interest in the estate to the adult lessee, and binds him until the minor chooses to avoid it.⁷ If the lease is by deed, he cannot avoid it until he comes of age; although he may always enter and take the profits until the time arrives when he has legal capacity to affirm or disaffirm the deed; and the instrument of lease will not be rendered void by

¹ *Rennie v. Robinson*, 1 Bing. 147; *Dunshee v. Grundy*, 15 Gray, 134.

² *Kieran v. Sandars*, 6 Ad. & E. 515; *Veale v. Warner*, 1 Wms. Saund. 323, 328, n. (d).

³ *Ibid.*; *Patten v. Deshon*, 1 Gray, 325, 326.

⁴ *Gouldsworth v. Knights*, 11 M. & W. 344; *Cuthbertson v. Irving*, 4 H. & N. 342; 6 *id.* 135; 1 Smith, L. C. 38 a-38 g.

⁵ *Roof v. Stafford*, 7 Cow. 179; *Johnson v. Packer*, 1 Nott & McC. 1; *Roberts v. Wiggin*, 1 N. H. 74; *Jackson v. Carpenter*, 11 Johns. 539. A rent-charge granted by an infant is voidable only. *Hudson v. Jones*, 3 Mod. 310.

⁶ *Bool v. Mix*, 17 Wend. 119; *Eagle Fire Co. v. Lent*, 6 Paige, 635; per Story, J., in *Tucker v. Moreland*, 10 Pet. 71; *Wheaton v. East*, 5 Yerg. 41; *Worcester v. Eaton*, 13 Mass. 371; *Roberts v. Wiggin*, *supra*; *Phillips v. Green*, 5 T. B. Mon. 344; *Farr v. Sumner*, 12 Vt. 28. The rule seems to be universal that all instruments under seal executed by an infant are voidable only; except those which delegate a naked authority, which are void. *Bool v. Mix*, *supra*.

⁷ *Zouch v. Parsons*, 3 Burr. 1794; *Walmsley v. Lindenberger*, 2 Rand. 478; *U. S. v. Bainbridge*, 1 Mason, 82; *Goodsell v. Myers*, 3 Wend. 479; *Brown v. Caldwell*, 10 S. & R. 114.

such an entry for he may still affirm it at full age.¹ But when the lease is by parol, if he ratifies it on coming of age, as by receiving rent which accrued after that period, or the like, he confirms the lease and cannot afterwards impeach it.²

§ 94. *Ratification implied.* — Slight acts of ratification are sufficient to show an infant's assent to a contract after his majority;³ and there are authorities which support the rule, that no distinct act of confirmation is necessary, but that all the voidable contracts of an infant are binding upon him unless there be an express disaffirmance of them on his part, when he comes of age.⁴ And as to a lease by an infant lessor, it is held that some act of notoriety, such as the bringing of an action of ejectment or the making of a formal entry or demand of possession, is required for such a purpose.⁵ The mere execution, after the infant attains full age, of another lease or conveyance of the same property, even to a purchaser for value, is not a disaffirmance of the deed.⁶ And to render

¹ *Roof v. Stafford*, 7 Cow. 179; 9 *id.* 626; Bac. Abr., tit. Infancy; *Bool v. Mix*, *supra*; *Slator v. Trimble*, 14 Ir. C. L. 342; *Robson v. Flight*, 4 De G. J. & S. 608.

² *Smith v. Low*, 1 Atk. 489; *Brown v. Caldwell*, 10 S. & R. 114; Co. Lit. 308, a; 1 Rol. 730; *Smith v. Bowin*, 1 Mod. 25; *Warwick v. Bruce*, 2 M. & S. 205; 4 Leon. 4.

³ *Houser v. Reynolds*, 1 Hayw. 143; *Den v. Stowe*, 2 Dev. & B. 320. But in *Slator v. Trimble*, 14 Ir. C. L. 342, acceptance of rent was held an affirmance of a lease made during minority, though the infant had commenced ejectment before majority and had demised the land to another. By statute 9 Geo. IV. c. 14, § 5, it is necessary that the ratification be in writing, signed by the party to be charged; but any writing is sufficient, which would be considered a ratification by an adult of an act done by one acting as agent. *Harris v. Wall*, 1 Exch. 122; *Hartley v. Wharton*, 11 Ad. & E. 934. A similar statute exists in Maine.

⁴ *Zouch v. Parsons*, *supra*; *Holmes v. Blogg*, 8 Taunt. 35; *Jackson v. Burchin*, 14 Johns. 124; *Curtin v. Patton*, 11 S. & R. 305; *Cheshire v. Barrett*, 4 McCord, 241; *Richardson v. Boright*, 9 Vt. 368. It is held that there are three ways of affirming the voidable contracts of an infant when he arrives at full age: 1. By express ratification; 2. By acts which reasonably imply affirmance; 3. By omission to disaffirm within a reasonable time. *Kline v. Bebee*, 6 Conn. 494; *Worcester v. Eaton*, 13 Mass. 871.

⁵ *Slater v. Brady*, 14 Ir. C. L. 61.

⁶ *Bool v. Mix*, *supra*; *Dominick v. Michael*, 4 Sandf. 374; *Slater v.*

such a subsequent conveyance an act of dissent to the prior deed, it must be so inconsistent therewith that both deeds cannot stand together.¹

§ 95. **Who may avoid. — Burden to prove Infancy. —** No one but the infant or his personal representative can avoid a lease on the ground of infancy. Avoidance being a personal privilege, the infant is, while living, the exclusive judge of the propriety of exercising it; and when he is dead, those alone may avoid who legally and personally represent him.² For this reason, mere privies in estate, such as assignees or guardians, cannot avoid an infant's lease³ [and the lessee cannot be permitted to set up the lessor's minority in order to defeat the lease or to obtain relief from its covenants⁴]. When a plea of infancy is interposed in defence to a contract, the burden of proof rests on the infant, although the issue be upon a ratification of his contract after he came of age.⁵

§ 96. **Infant Lessee's Ratification implied from Possession. —** An infant lessee may avoid a lease, although it is always available for the purpose of vesting the estate in him so long

Brady, *supra*. In order to avoid the deed of an infant after he comes of age, he must, before suit brought, make an entry on the land, and execute a deed to a third person or do some other act of equal notoriety, in disaffirmance of the deed. *Voorhies v. Voorhies*, 24 Barb. 150. Mortgaging the property to a tenant, referring to the lease, is a confirmation. *Story v. Johnson*, 3 Y. & C. 586.

¹ *Eagle Fire Co. v. Lent*, 6 Paige, 635. Mere acquiescence in a conveyance, after majority, without an intermediate benefit such as the possession of the premises or the collection of rent, is not an affirmation of the conveyance. *Jackson v. Carpenter*, 11 Johns. 539. And no bare recognition, or silent acquiescence, for a time less than the period of statutory limitation, will amount to a ratification of a deed. *Voorhies v. Voorhies*, *supra*; *Jackson v. Burchin*, *supra*.

² *Jackson v. Todd*, 6 Johns. 257; *Roberts v. Wiggin*, 1 N. H. 73; *Hartness v. Thompson*, 5 Johns. 160.

³ *Hoyle v. Stowe*, 2 Dev. & B. 323. But see *Dominick v. Michael*, 4 Sandf. 374; *Whittingham's Case*, 8 Co. 42, b; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Oliver v. Houdlet*, 13 Mass. 237; *Irvine v. Crocket*, 4 Bibb, 437.

⁴ *Field v. Herrick*, 101 Ill. 110, and see § 89, *ante*.

⁵ *Jeune v. Ward*, 2 Stark. 326; 2 Greenl. Ev. § 362.

as he thinks proper to hold it. If, upon his arrival at full age, he continues in possession of land demised to him during his minority, he will be deemed to have waived his right to avoid it unless he elects to do so within a reasonable time thereafter.¹ It is for a jury to determine what is a reasonable time, under the circumstances of each case ; but it seems that an acquiescence for four months after his majority would preclude an infant from afterwards disaffirming a lease.² As to his liability for rent, or the performance of other stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract ; for he may disaffirm it when he comes of age, or at any time previously thereto, and thus avoid his obligation. But so long as he remains in possession, his liability to pay rent and perform covenants subsists by virtue of the privity of estate ; and he can only escape payment by avoiding the lease before rent-day ; for, as a general rule, an infant cannot retain possession of property and at the same time repudiate his contracts in relation thereto.³ [The measure of the infant's liability in such a case is thus stated : " His purchase vested the estate in him, on entry and taking possession, and rendered him liable to the obligations attached to it until he disagreed to the estate and thereby caused the conveyance to be inoperative, and so avoided the obligation to pay rent. As the estate vests, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place." ⁴ So where an estate vests in an infant by operation of law, and he has not disclaimed, he becomes liable for rent, notwithstanding his infancy.⁵] Where the liability rests wholly in contract, as after the infant has quit possession, he may plead infancy as in other cases.⁶ An infant is always

¹ Bac. Abr., tit. Infant, p. 611 ; *Kline v. Bebee*, 6 Conn. 494.

² *Doe v. Smith*, 2 T. R. 486 ; *Holmes v. Blogg*, 8 Taunt. 85.

³ *Kitchen v. Lee*, 11 Paige, 107 ; *Henry v. Root*, 33 N. Y. 526. But see *Mass. case*.

⁴ *Parke, B.*, in *N. W. R. R. v. M'Michael*, 5 Exch. 126. See *Holmes v. Blogg*, *supra* ; § 628, *post*.

⁵ *Kelly v. Coote*, 5 Ir. C. L. 469.

⁶ *Kelsey's Case*, Cro. Jac. 820.

liable for necessities;¹ and, although this is a relative term, depending for its definition upon his situation in life, an obligation to pay for lodgings probably comes within this description. And where an infant rented a house, and exercised his trade therein, it was held to be for the jury to decide, in an action to charge him with the rent of the house after he had quit possession, whether such a contract came within the meaning of the term "necessaries."²

SECTION II.

BY PERSONS OF UNSOUND MIND.

§ 97. **Incapacity of Insane Persons.**—[The rule is sometimes stated, without qualification, that] idiots and lunatics, being void of understanding, and consequently unable to give that deliberate assent which is necessary to the validity of a contract, are, on principles of humanity as well as of justice, restrained from making any contract;³ although previous or subsequent lunacy will not vitiate a contract entered into during an interval of sanity;⁴ and Mr. Justice Story lays it down as a general principle, that the contract of any person who is *non compos mentis*—from age, imbecility, or other personal infirmity—is absolutely void.⁵ [It is true that in those jurisdictions where a judicial finding of insanity or habitual drunkenness renders the subject civilly dead, all contracts made by an idiot, lunatic, or habitual drunkard, after the finding, are absolutely void.⁶ But where an artificial incapacity is not created by the finding, or where no

¹ *Smith v. Oliphant*, 2 Sandf. 306; *Randall v. Sweet*, 1 Den. 460.

² *Lowe v. Griffiths*, 1 Hodges, 30; 1 Scott, 415.

³ *Faulder v. Silk*, 3 Camp. 126; *Seaver v. Phelps*, 11 Pick. 304; *Jackson v. King*, 4 Cow. 207; *Dane v. Kirkwall*, 8 C. & P. 679. An idiot is one who is a natural fool, or one *a nativitate*. A lunatic is one who has become *non compos mentis* by the visitation of God.

⁴ *Jackson v. King*, *supra*; *Johnson v. Moore*, 1 Litt. 871; *Owen v. Davies*, 1 Ves. Sr. 82.

⁵ 1 Story, Eq. § 222.

⁶ *L'Amoureux v. Crosby*, 2 Paige, 422; *White v. Palmer*, 4 Mass. 147; *Beverley's Case*, 4 Co. 126, b.

determination of the question of sanity has been had, the only "disability which will render the party incapable of contracting, is that which arises from a total loss of understanding, either in respect of all subjects, or of the particular act done: and it does not follow because . . . one might be a proper subject of a commission . . . that his acts will be either void or voidable in a court of law."¹] Thus the deed of a person who is *non compos mentis* is only void, *ab initio*, if he be under guardianship; if he is not under guardianship it is merely voidable, and may only become void according to circumstances.² [There is a strong analogy between a lunatic and an infant in relation to the power to contract. Either can oblige himself for necessities,³ and the law provides for each a formal process by which he may avoid his agreements.⁴] The guardian or committee of a lunatic is generally authorized to execute leases of his property under the direction of the court which appointed him; but, without the aid of a statutory provision conferring such authority upon the court, the committee of a lunatic will not have such power.⁵

¹ Buswell, Law of Insanity, § 277, and cases cited.

² Wait v. Maxwell, 5 Pick. 217; Webster v. Woodford, 8 Day, 90. The lunacy of a mortgagor does not absolutely avoid the mortgage; it is, at most, voidable at the election of the lunatic or his personal representatives, or those claiming some interest under him in the premises. Wentworth v. Tubb, 2 Y. & C. Ch. 537.

³ Baxter v. Portsmouth, 5 B. & C. 170, 2 C. & P. 178, 7 Dowl. & Ry. 614; Howard v. Digby, 2 C. & F. 634; Leach v. Marsh, 47 Maine, 548.

⁴ Ingraham v. Baldwin, 9 N. Y. 45.

⁵ Knipe v. Palmer, 2 Wils. 180. After a commission to inquire into an alleged case of lunacy has issued, and before inquisition found, all persons deal with the suspected individual at their peril; and conveyances made by him after that event will be set aside if the person dealing with him knew that proceedings had been taken. Griswold v. Miller, 15 Barb. 520. But the lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of covenant for quiet enjoyment. Matter of Strasburger, 132 N. Y. 128. The leading English cases, Molton v. Camroux, 2 Exch. 487; s. c. 4 Exch. 17; Beavan v. McDonnell, 9 id. 309, established the rule that a contract is not vitiated by the unsoundness of mind of one of the contracting parties if this fact is unknown to the other, and no advantage is taken of the lunatic; and the

§ 98. **Weakness alone does not incapacitate.** — Mere weakness of mind is not, of itself, a sufficient ground for avoiding a contract, unless stratagem or fraud has been resorted to by the person in whose favor it was made; for if a man be legally *compos mentis* he is the disposer of his own property and his will stands as a reason for his actions.¹ If an illiterate person is induced to sign a deed by a misrepresentation of its nature and contents, such deed being obtained by fraud is void;² but if he did not request it to be read to him and no false representation of its contents was made, it will not be avoided merely on the ground of his ignorance.³ Even one who is deaf and dumb from his birth, having intellectual capacity to comprehend the nature of his acts, is not legally incapable of executing a deed; and, although its contents are not fully communicated to him for the want of sufficient signs, it will be sufficient if it appears that he knew he was making a conveyance of his estate.⁴ But if, by fraud and misrepresentation, a lease different from the one which was directed to be prepared be imposed upon a blind man for execution, he may afterwards treat it as a nullity.⁵ Persons deaf, dumb, and blind from their nativity, labor under an absolute incapacity.⁶

rule is now generally adopted in the United States. See Buswell, *Law of Insanity*, §§ 287, 292. But this rule applies to cases in which the contract is not merely executory, but has been executed in whole or in part so that the parties cannot be restored to their original position. The committee of a lunatic becomes personally liable for rent if he takes possession and makes use of premises under a lease held by the lunatic. *Matter of Otis*, 34 Hun, 542.

¹ *Dods v. Wilson*, Const. 448; *Odell v. Buck*, 21 Wend. 142; *Fetrie v. Shoemaker*, 24 *id.* 85; *Jackson v. King*, 4 Cow. 207, 218; *Osmond v. Fitzroy*, 3 P. Wms. 130; *Toomes v. Conset*, 2 Atk. 251; *Sprague v. Duel*, 11 Paige, 480. See *Becker v. Church*, 115 N. Y. 562.

² *Jackson v. Hayner*, 12 Johns. 469; *White v. Small*, 2 Ca. in Ch. 108.

³ *Hallenbeck v. Dewitt*, 2 Johns. 404. No affirmative proof of his knowledge of the contents is necessary. *Mallan v. Story*, 2 E. D. Smith, 831; *Harris v. Story*, *id.* 868.

⁴ *Brown v. Brown*, 8 Conn. 299; *Brower v. Fisher*, 4 Johns. Ch. 441; Co. Lit. 42, b; *Shulter's Case*, 12 Co. 90, a.

⁵ *Shulter's Case*, *supra*; *Manser's Case*, 2 Co. 3, a; *Thoroughgood's Case*, *id.* 9, a.

⁶ Co. Lit. 42, b; Com. Dig. (Capacity), D. 4.

§ 99. **Nor Old Age alone.**—Nor does old age, alone, incapacitate a person from granting a lease. Fraud and imposition would, of course, defeat it; but the mere circumstance of an advanced age is not a sufficient ground from which to presume imposition; for, as Mr. Justice Buller observed, we have seen the greatest abilities displayed at a greater age than seventy-five.¹ So a lease made by a party under duress is not absolutely void, but voidable only by him when he recovers his free agency; but he cannot avoid it under the plea of *non est factum*, for it is his deed at the time of action brought, and he can only avoid it by a special plea.²

§ 100. **Drunkenness as avoiding the Contract.**—If a person is in an extreme state of intoxication, so as to be deprived of the exercise of reason, a lease obtained from him while in that condition would be void.³ This is an extension of the old rule on the subject, which was, that it was only where an unfair advantage had been taken of a drunken person, or some contrivance or management had been resorted to for the purpose of drawing him into drink, that equity would relieve him.⁴ The old jurists held that a man was not to be relieved from a contract which he had made while drunk.⁵ But the modern doctrine, concurring with the civil-law writ-

¹ *Lewis v. Pead*, 1 Ves. 19; *Waters v. Barral*, 2 Bush, 598.

² *Whelpdale's Case*, 5 Co. 119, a. *Thoroughgood's Case*, 2 Co. 9, a. By duress is meant that degree of severity, either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. 2 Greenl. Ev. § 801. Duress by mere advice, direction, influence, or persuasion, is unknown to the law. *Barrett v. French*, 1 Conn. 854.

³ *Prentice v. Achorn*, 2 Paige, 30; *Dulaney v. Green*, 4 Harr. 285; *Burns v. O'Rourke*, 5 Rob. (N. Y.) 649; *Barrett v. Buxton*, 2 Aik. 167; *Pitt v. Smith*, 3 Camp. 83; *Fenton v. Holloway*, 1 Stark. 126; *Cooke v. Clayworth*, 18 Ves. 16; *Lynch, In re*, 5 Paige, 120. Where a person, for any considerable part of his time, is intoxicated to such a degree as to be deprived of his ordinary faculties, it is *prima facie* evidence that he is incapable of managing his affairs, or of making a contract. *Tracy, In re*, 1 Paige, 582.

⁴ *Cory v. Cory*, 1 Ves. Sr. 19; 1 Fonb. Eq. 67; 1 Mad. Ch. 808. So *Belcher v. Belcher*, 10 Yerg. 121.

⁵ *Beverley's Case*, 4 Co. 125; *Osmond v. Fitzroy*, 8 P. Wms. 180; *Morris v. Nixon*, 7 Humph. 579.

ers, is that a contract made under such circumstances is void. So, under a plea of *non est factum*, a defendant will be permitted to prove that he was made to sign the deed when he was so drunk that he did not know what he did.¹ But evidence of complete and total drunkenness should be adduced; and it ought to be clear and satisfactory.² The decisions of some courts would make the contract of an intoxicated man voidable only; and not to be avoided if his assent has been given after he became sober.³

SECTION III.

BY AND TO MARRIED WOMEN.

§ 101. **Disability of, at Common Law.**—At common law, the ability of a married woman to contract is entirely suspended during coverture, and she is incapable, without the concurrence of her husband, of making a valid lease of lands of which they are seised in her right or of which she is possessed in her own right. Her separate deed, being absolutely void, does not admit of confirmation; and it is only when made under a power contained in a settlement that her individual leases can be sustained. The husband has sole dominion over her lands, with a right to lease and take the rents and profits thereof so long as the marriage relation subsists; and if a living child be born of the marriage, he has the same right during his own life, if he survives her.⁴

¹ *Cole v. Robbins*, Bul. N. P. 172; *Fenton v. Holloway*, 1 Stark. 126.

² *Adm'r of Lee v. Ware*, 1 Hill (S. C.), 313; *Johns v. Fritchey*, 39 Md. 258.

³ *Reinicker v. Smith*, 2 Har. & J. 421; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabnet*, 1 Bailey, 343; *Eaton v. Perry*, 20 Mo. 96; *Matthews v. Baxter*, L. R. 8 Exch. 132.

⁴ *Jackson v. McConnell*, 19 Wend. 175; *Chancy v. Strong*, 2 Root, 369; Co. Lit. 46, b; 351, b; *Manby v. Scott*, 1 Sid. 120; *Zouch v. Parsons*, 3 Burr. 1805; 4 Kent, Com. 26. It is held that a lease by a married woman of her lands to a gas and oil company for the purpose of operating thereon gas and oil wells is not an encumbrance or conveyance thereof within the meaning of a statute (§ 6961, Burns' R. S. 1894, Ind.), prohibiting a married woman from encum-

He has also an exclusive and absolute power of disposing of all such leasehold interests as she may possess; although, on his failing to dispose of them in his lifetime, they belong to her in preference to his personal representatives.¹ If he dies before her, he cannot dispose of them by will; but, if he survives her, they become his absolute property.² But his power of leasing her freehold estates is restricted to the continuance of a demise, made by himself alone, beyond the period of their joint lives, unless he becomes entitled as tenant by the curtesy; in which case the lessee may remain in possession during the remainder of the term, subject to an earlier determination by the death of the lessor.³

§ 102. **Lease by Husband of Wife's Property.** — At common law, the husband's lease of his wife's lands, in which she has not joined, will only bind her during the lifetime of her husband, for after his death she may confirm or avoid it at pleasure, although, until she avoids it by entry, it will stand good.⁴ And her acceptance of rent which has accrued since the death of her husband, will be deemed evidence of confirmation.⁵ But a mere verbal lease by husband and wife, of her lands, or a written lease to which she is not a party, is void as to the wife, and cannot be confirmed by her assent bearing or conveying her lands without her husband's joinder; since such a lease conveys a right of exploration, merely, the title or estate in the land remaining inchoate. *Heal v. Niagara Oil Co.*, 150 Ind. 483. See § 17 *a*, *ante*.

¹ *Druce v. Denison*, 6 Ves. 894; *Wildman v. Wildman*, 9 *id.* 177; *Sym's Case*, Cro. El. 33; *Loftus's Case*, *id.* 278; *Hayward v. Hayward*, 20 Pick. 517; Co. Lit. 351, b.

² *Jones v. Patterson*, 11 Barb. 572; *Hyde v. Stone*, 9 Cow. 230; *Watson v. Bonney*, 2 Sandf. 405; Co. Lit. 300, a, b; 351, a. The same result follows a divorce *a vinculo matrimonii*. *Legg v. Legg*, 8 Mass. 99; see also *Vallance v. Bausch*, 28 Barb. 633.

³ *Dixon v. Harrison*, Vaugh. 46; *Miller v. Manwaring*, Cro. Car. 397; *Marquat v. Marquat*, 12 N. Y. 336.

⁴ *Doe v. Weller*, 7 T. R. 478; *Jackson v. Holloway*, 7 Johns. 81; *Brown v. Lindsay*, 2 Hill, Ch. (S. C.) 542; *Jordan v. Wikes*, Cro. Jac. 382; *Smallman v. Agborrow*, *id.* 417; *Greenwood v. Tyber*, *id.* 563; *Winstell v. Hehl*, 6 Bush, 58.

⁵ *Worthington v. Young*, 6 Ohio, 313; *Trout v. McDonald*, 83 Pa. St. 144; *Wotton v. Hele*, 2 Saund. 180; but see *Winstell v. Hehl*, *supra*.

after the death of the husband; for her consent at the commencement of the term must appear by deed.¹

§ 103. **Deed of Wife, how far Effectual.** — The common law held every conveyance of a married woman absolutely void, except when done by matter of record, as by a fine and recovery; and even then, unless her husband was a party to the record, he might avoid it. But this mode of conveyance is now abolished by the English statutes, and has never been in force in the United States.² By local usage, however, in several if not in all the States, the wife's deed, in which her husband joined, followed by her separate acknowledgment, was held to be sufficient to pass her estate.³ By the New York Colonial Act of 1771, and by similar enactments in that as well as in other States, these latter modes of conveyance, with separate acknowledgment, were established or confirmed.⁴

§ 104. **Wife's Statutory Right to convey.** — Legislation has generally modified the common law with respect to the right of a married woman to control her separate estate, giving her power to take, hold, enjoy, and dispose of property, whether leasehold or otherwise, with the rents, issues, and profits thereof; so that she may now lease her separate estate, and contract in reference thereto, in the same manner and with the like effect as if she were unmarried.⁵ In some States the husband's joinder or concurrence in the lease or conveyance

¹ *Turney v. Sturges*, Dyer, 91, a; *Walsal v. Heath* Cro. El. 656; *Jackson v. Holloway*, *Winstell v. Hehl*, *supra*.

² *Meriam v. Harsen*, 2 Barb. Ch. 232.

³ *Thatcher v. Omans*, 8 Pick. 521; *Davey v. Turner*, 1 Dall. 11; *Watson v. Bailey*, 1 Binn. 470; *Fowler v. Shearer*, 7 Mass. 14; *Gordon v. Haywood*, 2 N. H. 402; *Manchester v. Hough*, 5 Mass. 67; *Lithgow v. Kavenagh*, 9 Mass. 172; *Jackson v. Holloway*, *supra*. The Revised Statutes of New York further provided that a non-resident *feme covert* might convey lands in that State by deed jointly with her husband, and the acknowledgment or proof of execution might be as if she were sole.

⁴ *Grout v. Townsend*, 2 Hill, 554; *Boal v. Mix*, 17 Wend. 119; *Jackson v. Gilchrist*, 15 Johns. 89; *Colcord v. Swan*, 7 Mass. 291; *Sawyer v. Little*, 4 Vt. 414; *Albany Ins. Co. v. Bay*, 4 N. Y. 9.

⁵ *Knapp v. Smith*, 27 N. Y. 277; *Draper v. Stouvenal*, 85 *id.* 512.

of his wife's real estate is still necessary,¹ though in others she may lease as if she were sole.² And a separate acknowledgment by the wife, upon her private examination, has also been dispensed with by statute.³ But she cannot, either separately or jointly with her husband, execute a valid power of attorney to convey; since the statutes which gave her a right to convey do not authorize her to delegate that right to another.⁴ And although at common law a married woman was

¹ Thus formerly in Massachusetts, to anything more than a lease for one year: Gen. Stat. c. 108, § 2; *Child v. Sampson*, 117 Mass. 62; but this requirement is now repealed: P. S. c. 147, §§ 1-7. In New Jersey, the husband must consent. *Den v. Lawshee*, 4 Zab. 613. So in Minnesota, unless the wife is authorized by a power. Gen. Stat. 1858, c. 61, § 108. Under L. 1869, c. 56, § 4, the husband cannot, as the wife's agent or attorney, make a valid lease of her property. *Sanford v. Johnson*, 24 Minn. 172. In Pennsylvania, both must join. See *Peck v. Ward*, 18 Pa. St. 506; *Thorndell v. Morrison*, 25 *id.* 326; *Shinn v. Holmes*, *id.* 142. So in Rhode Island: Gen. Stat. 1857, c. 136, §§ 4-8; Vermont: R. S. c. 65, § 2; c. 71, § 1; Maryland: Gen. L. c. 45, §§ 1-3; Ohio: see *Miller v. Hine*, 13 Ohio, 565; Indiana: R. S. c. 77, § 4; *Reese v. Cochran*, 10 Ind. 195; Missouri, Virginia, Kentucky, Tennessee, Alabama, Florida, Mississippi, Arkansas, Texas, and California. Under the Const. of Kansas, Sec. 9, Art. 15, establishing homesteads, a husband cannot, without the wife's consent, lease the homestead property and give possession, although the title to the same is in his name, if the lessee's possession will interfere with the enjoyment of the property by the wife. *Coughlin v. Coughlin*, 26 Kan. 116. In Delaware, the common law obtains, and joinder is necessary. *Harris v. Burton*, 4 Harringt. 66. So in Connecticut and Maryland; while in Georgia, the wife's realty vests in the husband by the marriage.

² So in Maine, Massachusetts, New Hampshire, New York, Michigan, Illinois, and Iowa. See *Prevost v. Lawrence*, 51 N. Y. 219. In some States she may lease even to her husband, *Albin v. Lord*, 39 N. H. 196; *State v. Hayes*, 59 *id.* 450; *Bank of America v. Banks*, 101 U. S. 240, or convey to him directly. *Allen v. Hooper*, 50 Me. 371; *Farr v. Sherman*, 11 Mich. 33.

³ *Blood v. Humphrey*, 17 Barb. 660; *Yale v. Dederer*, 18 N. Y. 271; *Wiles v. Peck*, 26 *id.* 42. But a separate acknowledgment is still necessary in Rhode Island: Gen. Stat. 1857, c. 136, §§ 4-8; New Jersey: *Den v. Lawshee*, 4 Zab. 613; Pennsylvania, North Carolina, and Kentucky. In Tennessee, a written lease of a married woman's land for the term of fifteen years, signed by herself and husband, but wanting her privy examination, is void. *Rogers v. Wheaton*, 88 Tenn. 665.

⁴ *Sumner v. Conant*, 10 Vt. 1; *Lane v. McKean*, 3 Shep. 304. In

not bound by an agreement to make a lease or by any express covenant contained in a lease, either at law or in equity,¹ yet this rule has been changed by statute in several States.²

§105. **Married Women as Lessees at Common Law.**—The same reasons which prevented a married woman from making a lease disqualified her from assuming the responsibilities of a lessee. A single woman might, of course, be a lessee, and if she afterwards married, her liabilities devolved upon her husband, who was bound for arrears of rent accruing as well before as after his wife's death, during the continuance of the lease.³ And a married woman might take a lease, even with-

New York by statute, when any married woman residing out of the State shall join with her husband in executing a power of attorney for the conveyance of real estate, situated in the State, the conveyance executed in virtue of such power shall have the same effect as if executed by such married woman in her own person; provided that the execution of the power by her shall have been first duly proved, or acknowledged, according to the provision of the statutes in relation to conveyances executed by married women residing out of the State. Laws of 1835, c. 275.

¹ *Jackson v. Vanderheyden*, 17 Johns. 167; *Martin v. Dwelly*, 6 Wend. 1; *Butler v. Buckingham*, 5 Day, 492; *Grout v. Townsend*, 2 Hill, 554; *Ex parte Thomes*, 3 Greenl. 50; *Aldridge v. Burlison*, 3 Blackf. 201.

² Thus in New Hampshire and Massachusetts she is bound by all contracts in relation to her property or business. Mass. Gen. Stat. c. 108, § 2; *Chapman v. Foster*, 6 Allen, 136; N. H. Comp. Stat. 1853, c. 382; *Ames v. Foster*, 42 N. H. 381. So in Maryland, Michigan, and Iowa, in respect of her separate property. Md. Laws, 1867, c. 223; *Tillman v. Shackleton*, 15 Mich. 447; Iowa R. S. c. 101. In New York, by contracts in respect of her separate property or trade. N. Y. Stat. 1860, March 20; *Barton v. Beer*, 35 Barb. 178; *Coster v. Isaacs*, 1 Rob. N. Y. 176. Under Stat. 1848, such contracts must expressly refer thereto. *Coakley v. Chamberlain*, 1 Sweeny, 676. In Wisconsin, on contracts necessary for enjoyment of her separate property. *Conway v. Smith*, 13 Wisc. 128; *Leonard v. Rogan*, 20 *id.* 540. In Georgia and South Carolina and Tennessee, in respect to her sole trade. *Waters v. Bean*, 15 Ga. 358; *Persica v. Maydell*, 102 Tenn. 207.

³ *Vane v. Minshall*, 1 Lev. 25; Anon., 6 Mod. 239. In Pennsylvania, where a husband is not liable for the antenuptial debts of his wife, if he does not enjoy the benefits of an antenuptial lease accepted by her, he is not liable upon the lease as co-contractor nor for the use and occupation of the premises. *Biery v. Ziegler*, 93 Pa. St. 367. The fact that a wife resides with her husband upon premises leased by him in her

out the express assent of her husband, for the estate vested till he dissented.¹ But the husband was liable for the rent which accrued during her occupation ; and the landlord could have no personal remedies therefor against her, either separately or jointly with her husband.² And it made no difference that she was at the time living separate from her husband ; or that she had eloped and was living in a state of adultery ; or even that she was separated from her husband by a decree of divorce *a mensa et thoro* ; for nothing short of a divorce *a vinculo matrimonii* would restore her ability to contract.³ But if her husband was a non-resident alien,⁴ or became civilly dead, or was imprisoned for life, or for a term of years, her disability was suspended during such periods, and her capacity to contract and assume the responsibilities of a lessee was restored.⁵

§ 106. **May contract as to Separate Property.** — But no incapacity to contract existed where such contract was necessary to the proper use and enjoyment of her separate property ;⁶ or where she had traded as a single woman and obtained credit as such ; or had a competent maintenance secured to her by her husband on which she was living apart from him ; or was authorized by statute to carry on business

name is not evidence that she authorized the leasing ; and, in the absence of proof of authority, or that she had knowledge that the hiring was in her name, she is not liable for the rent or the value of the use and occupation. *Sanford v. Pollock*, 105 N. Y. 450.

¹ *Swaine v. Holman*, Hob. 204 ; Co. Lit. 3, a. She might avoid such a lease after her husband's decease. *Vincent v. Buhler*, 22 N. Y. 450.

² *Rotch v. Miles*, 2 Conn. 638 ; *Edwards v. Davis*, 16 Johns. 281 ; *Marshall v. Rutton*, 8 T. R. 545 ; *Fowler v. Shearer*, 7 Mass. 14 ; *Albany Ins. Co. v. Bay*, 4 N. Y. 9. But see, *contra*, *Lawrence v. Heister*, 3 Har. & J. 371 ; *Sumner v. Conant*, 10 Vt. 1.

³ *Marshall v. Rutton*, *supra* ; *Lean v. Shutz*, 2 W. Bl. 1195 ; *Hyde v. Price*, 3 Ves. 443 ; *Lewis v. Lee*, 3 B. & C. 291 ; *Fairthorne v. Blaquiere*, 6 M. & S. 73 ; *Rawlins v. Vandyke*, 3 Esp. 250.

⁴ *Gregory v. Paul*, 15 Mass. 31 ; *Abbot v. Bayley*, 6 Pick. 89 ; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

⁵ *Ibid.* ; *Hatchett v. Baddeley*, 2 W. Bl. 1079.

⁶ *Todd v. Lee*, 15 Wis. 365 ; *Rhea v. Renner*, 1 Pet. 105 ; *Chauviere v. Fleige*, 6 La. Ann. 563 ; *Newbiggin v. Pillans*, 2 Bay, 162.

as if she were sole.¹ And she might assume any responsibility on the credit of her separate property. But in such cases the contract must have direct reference to her separate estate, and can be enforced only in equity.² And it must appear that, when making the contract, she intended to charge her separate estate therewith; or that the consideration obtained thereby was directly beneficial to such estate.³

§ 107. **Responsible on her Covenants and for Rent.**—The legislative acts enabling a married woman to hold separate property, independently of the husband's control, do not abrogate the rule of law which prevents her from binding herself personally for the payment of a debt, nor does such legislation invalidate a lease or the conditions upon which it may have been granted to her. A landlord may always avail himself of the privilege of re-entry, as in other cases, if the rent is not paid or a breach of condition happens.⁴ Nor do these enactments interfere with her privilege of charging her separate estate at law for the payment of rent, in express terms, or by necessary implication when she makes her contract. What, in the absence of an express contract, shall be deemed sufficient evidence of her intention to charge her separate property, is a matter of some difficulty; but it seems to be conceded as sufficient, if the debt was contracted for the immediate benefit of her estate or for her personal benefit upon the credit of such estate.⁵ In most of the States it is

¹ *Corbett v. Poelnitz*, 1 T. R. 5; *Baker v. Barney*, 8 Johns. 72.

² *Wheaton v. Phillips*, 12 N. J. Eq. 221; *Willard v. Eastham*, 15 Gray, 328; *Aimes v. Foster*, 42 N. H. 331; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Gage v. Gates*, 62 Mo. 412. It is held in Maine that the statutory enactment, that a wife cannot, without the joinder of her husband, convey real estate conveyed to her by him, or paid for by him, or given or devised to her by his relatives, does not prevent her legally leasing the premises in her name alone for a term of years. *Perkins v. Morse*, 78 Me. 17.

³ *Yale v. Dederer*, 18 N. Y. 265; s. c. 22 *id.* 450; *Kantrowitz v. Prather*, 31 Ind. 62; *Wood v. Sanchey*, 3 Daly, 197; *Miller v. Hasting*, 36 Iowa, 163; *Willard v. Eastham*, *supra*. In Maryland, her estate is liable for all such debts as she, together with her husband, may expressly or by clear implication charge thereon. *Hall v. Eccleston*, 37 Md. 510.

⁴ *Draper v. Stouvenal*, 35 N. Y. 507.

⁵ *Curtis v. Engle*, 2 Sandf. Ch. 287; *Nixon v. Hadley*, 78 Ill. 611;

held that when a married woman takes a lease for years the term becomes her separate estate; that she may contract in reference thereto, even in the act of acquiring it, as if she were a single woman; and that her use and occupation of the premises creates a charge upon such estate for the rent, since the charge grows out of the beneficial nature of the contract to her individually and may be enforced against her separate estate as well as if directly charged thereon.¹

SECTION IV.

BY A TENANT FOR YEARS OR FOR LIFE.

§ 108. **Tenant may underlet and enforce Covenants.**—The tenant of the original lessor so long as his interest lasts, has a right to underlet to any person; for, while his interest in the premises continues, he has the absolute disposition of it, unless some covenant between him and the landlord limits his power so to do.² And such derivative lessee may be compelled by his immediate landlord to pay rent and perform covenants, according to the terms agreed upon between them; although he is not liable to the original lessor for the rent re-

Jacques v. M. E. Church, 17 Johns. 549. In Missouri, the making of a written contract by her is said to raise a presumption that she intends to bind her separate estate. *Metr. Bk. v. Taylor*, 62 Mo. 338. But see *Willard v. Eastham*, 15 Gray, 328.

¹ *Vandevoort v. Gould*, 36 N. Y. 689; *Yale v. Dederer*, *supra*; *Taylor v. Glenny*, 22 How. Pr. 240; *Prevost v. Lawrence*, 51 N. Y. 219; *Westervelt v. Ackley*, 62 *id.* 505; *Fiske v. McIntosh*, 101 Mass. 66. Thus an agreement for board and lodging for herself and her husband, though by parol, on a promise to pay therefor out of her separate property, binds that property. *Moxon v. Scott*, 55 N. Y. 247. No agreement will be implied between husband and wife that the former is the tenant of the latter, when they live as a common family on the land of the wife and the crops raised thereon by him belong to her. *Stout v. Perry*, 70 Ind. 501.

² *Jackson v. Harrison*, 17 Johns. 66; *Eten v. Luyster*, 60 N. Y. 252; *Shaw v. Farnsworth*, 108 Mass. 357. A change of tenants of an insured building, without the consent of the insurance company, does not vitiate the policy. *Gates v. Madison Ins. Co.*, 5 N. Y. 469.

served on the first lease, since there is no such privity between the under-tenant and the original lessor as there is between a lessee and an assignee.¹

§ 109. **Estate and Liabilities of Under-lessee.** — An under-lease vests only a partial estate in the under-lessee, a reversion being left in the lessor, the duration of which is immaterial; as it may be for a year, a day, or an hour. And if rent is reserved in the under-lease, it need not contain a power of distress, for, except where abolished by statute, such a power is incident to every demise.² But as no privity exists between an under-lessee and the original lessor, the covenants between the latter and the original lessee, although they be covenants running with the land, as to pay rent or repair, cannot affect the under-lessee personally.³ The land, however, is not discharged by an under-lease, from the claims of the original lessor, who, notwithstanding the under-lease, may distrain, or evict either tenant or under-tenant if rent be in arrear or if a forfeiture has been incurred by his lessee.⁴ But an assignment transfers the whole interest of the lessee to the assignee; and the essence of the instrument, as an assignment, so far as the original lessor or strictly reversionary rights are concerned, will not be destroyed by its reserving a rent to the assignor, with a power of re-entry for non-payment; nor by its assuming, by the use of the word "demise," or otherwise, the character of a lease.⁵ An assignee is personally liable to the lessor upon all covenants which run with the land; the premises also remaining liable to a distress for rent.⁶

¹ *McFarlan v. Watson*, 3 N. Y. 286; *Jackson v. Davis*, 5 Cow. 129. See *Marshall v. Lippman*, 16 Hun, 110; *Ritzler v. Raether*, 10 Daly, 286.

² Co. Lit. 141, b; 142, a; *Curtis v. Wheeler*, 1 Mood. & M. 493.

³ *Holford v. Hatch*, 1 Doug. 183; *Earl of Derby v. Taylor*, 1 East, 502; *Doe v. Byron*, 1 C. B. 623-626; *Robinson v. Lehman*, 72 Ala. 401.

⁴ *Arnsby v. Woodward*, 6 B. & C. 519; *Miller v. Prescott*, 163 Mass. 12.

⁵ *Palmer v. Edwards*, 1 Doug. 187, n.; *Doe v. Bateman*, 2 B. & A. 168.

⁶ *Hicks v. Downing*, 1 Ld. Ray. 99; *Parmenter v. Webber*, 8 Taunt. 593; *Hume v. Hendrickson*, 79 N. Y. 117. The sureties of the assignee being liable to the landlord may in turn look to the sureties of a second assignee who is in default, since the doctrine of subrogation does not depend upon privity. *Bender v. George*, 92 Pa. St. 86.

§ 110. **Liabilities of Mesne Lessee.** — A lessee, on granting an under-lease, cannot protect himself fully from the consequences of a breach by the under-lessee of the covenants in the original lease by merely taking from the under-lessee corresponding covenants, but he should take a covenant of indemnity against such breach.¹ [Thus a lessee who had covenanted to insure with a condition for re-entry for a breach, demised to parties with a like covenant on their part; neither the lessee nor the sublessees insured, and the lessor re-entered and ousted the lessee. An action by the lessee against the sublessees for the value of his reversion was held not to lie, because the lessee had taken no covenant of indemnity and the similar covenant given to the lessee by the sublessees did not cover breaches committed by him.² The lessee having made a general covenant to repair, made a sublease with like covenants, and, being notified by the lessor to repair, in turn, notified the sublessee; but, being threatened with re-entry, repaired himself, and sued the sublessee; it was held that, on the general covenant to repair, only damages for injuries to the reversion were recoverable before the expiration of the lease.³] A prudent under-lessee will stipulate for the insertion of a clause to protect himself from paying rent till his lessor produces the superior landlord's receipt for the chief rent; with a provision, that, if such rent is not paid when due, the under-lessee may pay it to the superior landlord in discharge of his own rent.⁴ He ought also, when contracting for an under-lease, to inform himself of the covenants contained in the original lease; for, if he enters and takes possession of the property, he will be bound by all such covenants as run with the land.⁵ [And one who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, will be taken to have construc-

¹ *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249.

² *Logan v. Hall*, 4 C. B. 598.

³ *Williams v. Williams*, L. R. 9 C. P. 659.

⁴ *Roe v. Harrison*, 2 T. R. 425. In default of payment by an intermediate tenant, and to save himself from a distress or ouster, he may pay his rent to the original landlord and deduct the amount from the sum he owes to his landlord. *Lageman v. Kloppenburg*, 2 E. D. Smith, 126.

⁵ *Coster v. Collinge*, 3 Mylne & K. 283.

tive notice of all the usual covenants contained in the original lease.^{1]}

§ 111. **Duration of Under-lease limited. — How determined. — Under-lessee may distrain.** — No tenant can make an under-lease to convey an interest exceeding his own in point of duration; and the demise of a tenant from year to year, to hold from year to year, will operate only during the continuance of his own tenancy.² But the interest of an under-lessee cannot be defeated by the mesne lessee's surrendering his estate in the premises to the lessor,³ nor by the original lessor's giving him notice to quit. Such notice, in order to be effectual, must be given either by the lessor to his lessee or by the mesne lessee to the under-lessee.⁴ A tenant from year to year, who underlets from year to year, acquires such a reversion as will entitle him to distrain for rent.⁵ If a tenant for a term of years underlets part of the premises from year to year, and, at the expiration of the term, agrees with the lessor to hold on from month to month, in the absence of any new agreement between the tenant and under-tenant, the old tenancy will continue as between them.⁶

§ 112. **Leases for Life, how determined.** — It is obvious that any lease, whether made by a tenant for his own life or that of another, unless authorized by an express power from the owner of the fee, must terminate on the death of the lessor in one case, or of the *cestui que vie* in the other; for no man can confer on another a larger estate than he himself possesses.⁷

¹ *Flight v. Barton*, 3 Mylne & K. 282. See *Porter v. Drew*, 5 C. P. D. 143.

² *Pike v. Eyre*, 9 B. & C. 909; *Oxley v. James*, 13 M. & W. 209; *Kelley v. Patterson*, L. R. 9 C. P. 681.

³ *Brown v. Butler*, 5 Phil. 71; *Hessel v. Johnson*, 129 Pa. 173; *Adams v. Goddard*, 48 Me. 212; *Eten v. Luyster*, 60 N. Y. 252; *Allen v. Brown*, 5 Lans. 280; *Ritzler v. Raether*, 10 Daly, 286; but see *Lennen v. Lennen*, 87 Ind. 130.

⁴ Co. Lit. 338, b; *Doe v. Pyke*, 5 M. & S. 146; *Torriano v. Young*, 6 C. & P. 8; *Piggott v. Stratton*, 1 De G. F. & J. 33.

⁵ *Pleasant v. Benson*, 14 East, 234; *Curtis v. Wheeler*, 1 Mood. & M. 493; *Oxley v. James*, *supra*.

⁶ *Pierse v. Sharr*, 2 Mann. & R. 418.

⁷ *Smyth, ex parte*, 1 Swanst. 355; *Symons v. Symons*, 6 Madd. 207;

At common law, the lease of a mere tenant at will is void; he having no certain interest to dispose of, so that the very act of letting to a stranger becomes a determination of his will. Neither can he surrender any more than he can grant; for to surrender would be to determine his will and relinquish his estate.¹

§ 113. **Leases for Years by Tenants by the Curtesy, or in Dower.** — As tenants for life cannot, unless by the aid of a statute [or express power], make leases for a longer period than their own lives, it follows that, where a tenant by the curtesy or in dower makes a lease for years, this will be determined by his or her death, and no acceptance of rent by the heir or the reversioner can confirm the lease; and the lessees holding over, unless recognized by the succeeding owner as tenants from year to year, are tenants by sufferance.² But if the remainder-man has encouraged an expenditure by the lessee on improvements, in confidence of his continuing tenant, or has suffered him to incur the expense of rebuilding, and does not, by his answer, deny that he had

Doe v. Butcher, 1 Doug. 50; *Doe v. Archer*, 1 B. & P. 531; *Bowes v. E. Lond. Waterworks*, 3 Madd. 375; *Chilvers v. Race*, 196 Ill. 71; *Co. Lit.* 47, b. In New York, by statute, a tenant for life may, by virtue of a power granted to him by the owner of the fee, make leases, for not more than twenty-one years to commence in possession during his life. 1 R.S. 733, §§ 87–89. This power is not assignable as a separate interest, but is annexed to the estate, and will pass, unless excepted, by a conveyance. It may be released by the tenant to any person entitled to an expectant estate in the lands, and will be thereby extinguished. A power given to a devisee for life, to lease for a life or lives, or for a term exceeding twenty-one years, is void; and cannot be sustained on the supposition that it will be executed by making leases for not more than twenty-one years; especially where such execution would render the life-estate worthless. *Root v. Stuyvesant*, 18 Wend. 257, 315.

¹ *Moss v. Gallimore*, Doug. 283; *Sweeper v. Randal*, Cro. El. 156; *Birch v. Wright*, 1 T. R. 382; *Clark v. Wheelock*, 99 Mass. 14. It is held, in Missouri, that the lease of a tenant at will is good as between himself and his lessee, but that, on the determination of the former estate, the tenant's lessee becomes the tenant at sufferance of the original landlord. *Meier v. Thiemann*, 15 Mo. App. 307.

² *Co. Lit.* 47, b; *Rowe v. Huntington*, Vaugh. 80, 81; *Miller v. Manwaring*, Cro. Car. 397; *Coakley v. Chamberlain*, 1 Sweeny, 675.

notice of the lessee's proceedings, he will be precluded from disputing such a lease.¹ A subsequent acceptance of rent, with an acknowledgment of a tenancy, may amount to a new demise by the remainder-man, the lessee being a tenant at sufferance in the interval.² But, where the remainder-man or reversioner joins with the tenant for life in making a lease, it is good; and is considered, during the life of the tenant for life, as his lease and the confirmation of the remainder-man or reversioner; and, after the death of the tenant for life, it will be taken to be the lease of the remainder-man or reversioner, and the confirmation of the tenant for life.³ But it has been held that a lease executed by a tenant for life, in which the reversioner, who was then under age, was named a party but did not execute, was void on the death of the tenant for life; and that a subsequent execution of it by the reversioner would not make it good.⁴

SECTION V.

BY JOINT TENANTS AND TENANTS IN COMMON

§ 114. **Of One, passes his Undivided Interest. — Survivorship. — Partners.** — The general rule, with respect to property held by joint tenants or by tenants in common, is, that neither can transfer anything more than his undivided interest; but either of them may grant leases of that interest, for life, for years, or at will; or the several parties in interest may join and convey the entirety.⁵ [If one cotenant lets either a specified part or the whole of the premises, the lease is valid, *inter partes*, but invalid as to the tenants who do not join.⁶] If one

¹ *Stiles v. Cowper*, 3 Atk. 692; *Jackson v. Cator*, 5 Ves. 688; *Dann v. Spurrier*, 7 *id.* 231; *Pilling v. Armitage*, 12 *id.* 78-85. But, although the remainder-man acts as agent of the life-tenant in letting, he is not estopped to recover the premises from the lessee on the decease of the life-tenant during the term. *Page v. Wright*, 14 Allen, 182.

² *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365.

³ *Treport's Case*, 6 Co. 14, b; 2 Prest. Conv. 141.

⁴ *Ludford v. Barber*, 1 T. R. 86.

⁵ *Anderson v. Tompkins*, 1 Brock. C. C. 456, 463; *Putnam v. Wise*, 1 Hill, 234.

⁶ *Cunningham v. Pattee*, 99 Mass. 248; *Taintor v. Cole*, 120 Mass. 162;

joint tenant leases his moiety for years, and dies before the lessee's entry, the lease will bind the survivor and the lessee will retain his interest in the moiety demised until his term expires. And if one joint tenant makes a lease to commence after his death, his cotenant, if he survives, will be bound by it.¹ So one or more joint tenants may demise his or their portion to another joint tenant, and thereby create the relation of landlord and tenant between them, with a right to distrain in respect of rent in arrear.² We should observe that the rules applicable to partnership property do not apply to real estate; and hence, when real estate is held by partners in trade, for the purposes of their business, they hold as tenants in common, and not as joint tenants.³

§ 115. **Effect of Lease by. — Actions on.** — If parceners, or joint tenants, join in a lease, there can be but one lease, for they have but one freehold; but if tenants in common join in a lease, it amounts to several leases of their respective interests.⁴ One joint tenant, or tenant in common, may make

Dewitt v. Harvey, 4 Gray, 486; *Austin v. Ahearne*, 61 N. Y. 6; *Moreland v. Strong*, 115 Mich. 211; *Martens v. O'Connell*, 101 Wis. 18; *Forest Mill Co. v. Cedar F. Mill Co.*, 103 Iowa, 619. Generally, by statute, heirs take as tenants in common; and so do devisees and legatees, unless it is otherwise provided. See *Putnam v. Putnam*, 4 Bradf. 308. Executors and trustees generally take as joint tenants. In Massachusetts all conveyances or devises are in common, unless expressly provided otherwise, or when made to trustees or mortgagees. Pub. Stats. ch. 120, §§ 15, 16.

¹ *Grute v. Locroft*, Cro. El. 287; *Whitlock v. Horton*, Cro. Jac. 91.

² *Cowper v. Fletcher*, 6 B. & S. 464; *Evans v. English*, 61 Ala. 416. As to the lease of one tenant in common to his cotenant of his undivided interest, see *Dresser v. Dresser*, 40 Barb. 300.

³ *Coles v. Coles*, 15 Johns. 159; *Balmain v. Shore*, 9 Ves. 500; *Thornton v. Dixon*, 3 Bro. C. C. 199; *Dillon v. Brown*, 11 Gray, 179. See § 117, *post*. A lease being partnership property, the assignment thereof by one of the firm was valid, if done by authority of the other members of the firm, or ratified by them. *McGahon v. Bank*, 156 U. S. 219; *Edwards v. Spaulding*, 20 Mont. 54. A joint lease to husband and wife does not come within the rules applicable to tenants in common; the husband's common-law rights as head of the household are important. *Nolan v. Nolan*, 78 Mich. 17.

⁴ 2 Roll. Abr. 64; *Shep. Touch.* 268, n. 3. In Ohio it is said, tenants in common may make a joint lease. *Massie v. Long*, 2 Ohio, 287, 301.

a lease of his part to his companion; and this gives him a right to take the whole profits; when before he had but a right to the moiety thereof; and he may contract with his companion for that purpose as well as with a stranger.¹ And where tenants in common join in a lease, reserving an entire rent, they may join in enforcing payment of it; but if there be a separate reservation to each they must each bring a separate action.² In such case, however, the survivor may sue for the whole rent, although the reservation is to the lessors according to their respective interests.³ If tenants in common make several demises of their undivided shares, either by distinct instruments or by the same instrument, they must sever in an action; for a joint action can only be maintained on a joint demise.⁴ But if the action be upon a covenant, and the cause of action be one and entire, tenants in common, being covenantees, must join, although the covenant

¹ Cro. Jac. 83-611; *Keay v. Goodwin*, 16 Mass. 1. The relation of landlord and tenant is thereby created, with a right to distrain for rent. *Cowper v. Fletcher*, 6 B. & S. 464. If a tenant in common hires of his cotenant, and for a term occupies exclusively, he is not bound, at the expiration of the term, to abandon possession nor to make partition and occupy only one half, even although his cotenant has given him notice to quit; it is sufficient if he offers possession of half, and does no act to prevent his cotenant from occupying with him. *Mumford v. Brown*, 1 Wend. 52; *Campbell v. Campbell*, 21 Mich. 485. But one tenant in common does not, by occupying the whole estate, if he does not exclude his cotenant, become liable to the latter in use and occupation. *Badger v. Holmes*, 6 Gray, 118; *Austin v. Ahearne*, 61 N. Y. 6, 14; *Israel v. Israel*, 30 Md. 120; *Hutton v. Powers*, 38 Mo. 353; *Graham v. Pierce*, 19 Gratt. 28; *Barrell v. Barrell*, 25 N. J. Eq. 573.

² *Powis v. Smith*, 5 B. & A. 850. One joint tenant may receive the whole rent, and give a discharge for it. *Robinson v. Hoffman*, 4 Bing. 562. Where one such tenant receives the rents and profits, although the others may have an equitable lien on his undivided portion of the premises therefor, yet, upon his death, these are primarily chargeable upon his personal estate. *Hannan v. Osborn*, 4 Paige, 386.

³ *Wallace v. McLaren*, 1 Mann. & R. 516.

⁴ *Powis v. Smith*, 5 B. & A. 851. Tenants in common may maintain a joint action for rent due, under a sealed lease of the joint estate, all the covenants in which are with them jointly; although, by an agreement annexed to the lease and made part thereof, it is stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray, 256.

be with them, and each and every of them.¹ If the cause of action be separate and distinct, tenants in common must sue severally, though the covenant be joint in terms; but the several interest and ground of action must distinctly appear, as in the case of covenants to pay separate rents, to tenants in common, upon demises by them.² [Where several tenants in common appoint one of their number to collect rents, any one of them may, at any time, revoke the agency as far as his own interest is concerned, and the tenant on notice thereof is bound to pay the owner so revoking his proportionate part of the rent.³]

§ 116. **Form of Lease by Tenants in Common.** — Where tenants in common concur in granting a lease, each usually demises, according to his particular estate and interest; the instrument containing one grant of the whole estate, with a separate render of rent to each of the lessors and a separate covenant for the payment of rent to each. But as, under a lease in this form, the lessors must bring separate actions for their respective portions of the rent, it is better that the demise should be joint, with one render of the entire rent to the lessors simply, which will not prevent their taking it as tenants in common, the rent following the reversion; and, in this case, they may join in an action of covenant or sue separately in debt, at their option.

§ 117. **Partners as Parties to Leases.** — Deed of one binds the others. — [Since the tenure of partners in the real estate held for the purposes of the partnership business is that of tenants in common,⁴ it follows that, at common law, one partner cannot bind another to a lease, unless duly and expressly authorized so to do; and one partner's demise of real

¹ *Slingby's Case*, 5 Co. 18, b; *Withers v. Bircham*, 3 B. & C. 254; *Dorsett v. Gray*, 98 Ind. 273.

² *Servante v. James*, 10 B. & C. 410. One tenant in common may maintain an action for his share of the rents and profits against a third person who has collected the whole. *Smith v. Marsh*, 2 Dane, Ab. 228, 449.

³ *Barrett v. Bemelmans*, 163 Pa. 122.

⁴ See § 114, *ante*.

estate so held will pass only his own undivided interest therein.¹] By the common law, one partner could not bind another to a lease, or by any other instrument under seal, unless he had previous express authority for the purpose.² But this doctrine has been relaxed and it is now generally held that one partner, if in the presence of his copartners, may execute a deed for them, in a transaction in which they are all concerned;³ and an absent partner may be bound by a deed, executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the act.⁴ And it has been held that the implied authority from the character or scope of the partnership business will enable a partner to bind the firm by any instrument under seal which that business requires.⁵ [An action on a lease by and to a firm should be declared on in the names of the individual members;⁶ and when a lease to one partner, for the firm, expires at the same time as the partnership, such partner may take a renewal in his own name.⁷ So a firm which has contracted to take a lease may do so, though the firm is dissolved.⁸ But, where the term continued after the dissolution, those of the partners who occupied or let the premises were held accountable for the improved

¹ *Dillon v. Brown*, 11 Gray, 179.

² *Harrison v. Jackson*, 7 T. R. 207; *Dillon v. Brown*, 11 Gray, 179; *Turbeville v. Ryan*, 1 Humph. 113.

³ *Mills v. Barber*, 4 Day, 428; *Gerard v. Basse*, 1 Dall. 119; *Hart v. Withers*, 1 Penn. 285; *Grazebrook v. McCreddie*, 9 Wend. 439. The fact that a lease for copartnership purposes is made to one member of the firm does not authorize him to take a renewal of it in his own name and for his own benefit, and such a renewal will enure to the benefit of the firm. *Mitchell v. Read*, 84 N. Y. 556.

⁴ *Skinner v. Dayton*, 19 Johns. 513. So, on the other hand, a lease by one partner to the firm ends with the firm: *Johnson v. Hartshorn*, 52 N. Y. 173; or if the term continues, or a right of renewal exists, this is an asset of the partnership: *Eaton's Appeal*, 66 Pa. St. 483; *Betts v. June*, 51 N. Y. 274.

⁵ *Gram v. Seton*, 1 Hall, 262. The authority of one partner to bind the firm may be shown by circumstances. *Butler v. Stocking*, 8 N. Y. 408.

⁶ *Rohrburg v. Reed*, 57 Mo. 392.

⁷ *Mitchell v. Read*, 61 Barb. 310.

⁸ *Palmer v. Sawyer*, 114 Mass. 19.

value;¹ and a right of renewal is to be exercised by the surviving partner as such.² It has been held that incoming partners of the lessee who hold over are bound by the terms of the lease in like manner with the lessee.³ There may be a partnership in the use of land, for farming or mining purposes, in which the law-merchant will govern to the same extent as in ordinary mercantile transactions. But in buying and selling land on the joint account of several, the land retains the character of real estate, and each associate contracts for himself except so far as partnership rights and equities require it to be treated as personalty.⁴ Equity will interfere by injunction to restrain one partner from violating the rights of his copartner, even when a dissolution of the partnership is not contemplated; as where the copartners are respectively lessor and lessee of property which by agreement is to be used in the partnership business.⁵]

¹ Eaton's Appeal, 66 Penn. St. 483.

² Betts v. June, 51 N. Y. 274.

³ Wilgus v. Lewis, 8 Mo. App. 336.

⁴ Dyer v. Clark, 5 Met. 562; Patterson v. Brewster, 4 Edw. 352; Buchan v. Sumner, 2 Barb. Ch. 199. See Darby v. Darby, 3 Drewry, 495. To what extent there may be a partnership for buying and selling real estate merely, see Sage v. Sherman, 2 N. Y. 417; Fall River Co. v. Borden, 10 Cush. 485. To constitute real estate partnership property, it must not only be purchased with the funds of the firm, but must be used for partnership purposes. Cox v. McBurney, 2 Sandf. 561; and see Otis v. Sill, 8 Barb. 102; Anderson v. Lemon, 8 N. Y. 236. Where a lease to a partnership was executed by one partner, but another authorized the lease and tenancy, the estate of the latter is liable for the rent due by the firm. Bodey v. Cooper, 82 Md. 625. In a lease executed by a firm composed of several parties, the covenants are several as well as joint, and each individual of the firm is liable thereon. Dunn v. Jaffray, 36 Kan. 408.

⁵ Leavitt v. Windsor Land & Inv. Co., 12 U. S. App. 193. Where one of two tenants in common has acquiesced in a lease for a year executed by his cotenant alone to a firm of which the latter is a member, and has brought suit against the lessees as holding over for another year under the lease, he is considered to have adopted the lease and to have recognized the authority of his cotenant to make it and to treat with his firm in reference to it; and if the latter, on the termination of the lease, has given his firm permission to remain in possession temporarily, at a *pro rata* rent, the members of the firm are entitled to show that fact, in defence of the action seeking to hold them liable as holding over under the lease.

SECTION VI.

BY MORTGAGOR AND MORTGAGEE.

§ 118. **By Mortgagor in Possession.** — Good except as against Mortgagee. — At common law, a mortgagor, after the delivery of the mortgage, unless he has reserved possession to himself until breach, and in that case after breach by default, has a mere equitable interest in the land and not an estate which can be recognized in a court of law; and a lease created by a mortgagor subsequent to the mortgage, or when made by a *cestui que trust*, cannot be set up in a court of law as against the trustee or mortgagee.¹ In this respect, mortgagors are in the same situation as strangers having no interest in the property they undertake to lease although they may be in possession. But such leases are good as between the parties, by virtue of the contract;² for as against all persons, except the mortgagee and those claiming under him, the mortgagor is to be considered owner of the land so long as he remains in possession, with the power of leasing or conveying it, subject to the incumbrance.³ But a mortgagee in possession cannot

Valentine v. Healey, 158 N. Y. 369. Where the owners of three quarters of a store, holding in common and undivided with the owner of the other quarter, rented their three fourths to a tenant who necessarily occupied the whole store in order to avail himself of the occupancy of the three fourths, such tenant or occupant, being unable to agree upon any terms for the occupancy of the one fourth with the owner thereof, becomes liable, by an implied promise created by the relations of the parties, to pay to such owner a reasonable rent for his interest in the premises; and no further or greater liability rests upon such tenant for his occupancy. Nott v. Owen, 86 Me. 98.

¹ Webb v. Russell, 3 T. R. 393; Keith v. Swan, 11 Mass. 216; Roe v. Lowe, 1 H. Bl. 447; Howell v. Schenck, 4 Zab. 89. The Judicature Act, 1873, s. 25, sub-s. 5, does not give to a mortgagor in possession of land subject to a lease, the right to re-enter for breach of the covenants of the lease. Matthews v. Usher, 1900, 2 Q. B. 535.

² Thorn v. Burton, 1 Keb. 24.

³ Willington v. Gale, 7 Mass. 138; Collins v. Torry, 7 Johns. 278; Blaney v. Bearce, 2 Greenl. 132. A mortgagee is not liable for misrepresentations as to the sanitary condition of the leased premises made

make a lease to bind the mortgagor when he comes to redeem.¹

§ 119. **Mutual Rights of Mortgagee and Tenant under Prior Lease.** — A tenant under a lease made prior to a mortgage cannot be dispossessed by the mortgagee, unless by virtue of a proviso for re-entry upon the non-payment of rent or the non-performance of covenants; for the mortgagee, as assignee of the reversion, has no higher rights than the mortgagor.² But, to secure to himself the benefit of the rent and covenants, a mortgagee should give the lessee notice of the mortgage, and require payment of the rent to be made to himself; and at common law he is entitled as well to rent which has fallen due since the mortgage was made, and remains unpaid to the mortgagor, as to that which accrued due after notice; yet, until notice, the lessee is justified in paying rent to the mortgagor.³

by the mortgagor in possession in leasing the same in the absence of evidence that the mortgagor was acting as the agent of the mortgagee. *Tilden v. Greenwood*, 149 Mass. 667.

¹ *Hungerford v. Clay*, 9 Mod. 1. Where a mortgagee becomes lessee of the mortgaged premises, and covenants to pay rent to the mortgagor until condition broken, he continues bound by his covenant and cannot set up his mortgage against the lease. But if a lessee under covenant to pay rent takes a mortgage of the leased premises, he is released from his covenant until the condition of the mortgage is performed or the estate is redeemed. *Newell v. Wright*, 8 Mass. 138, 151. And see *Scott v. Fritz*, 51 Pa. St. 418.

² *Moss v. Gallimore*, Doug. 279; *Rogers v. Humphreys*, 4 Ad. & E. 299.

³ *Moss v. Gallimore*, *supra*; *King v. Housatonic R. R. Co.*, 45 Conn. 226; see also *Trent v. Hunt*, 9 Exch. 14. The rents in arrear when the mortgage is executed belong to the mortgagor. *King v. Housatonic R. R. Co.*, *supra*. The mortgagor, if allowed to remain in, must distrain in the mortgagee's name. Where a tenant paid rent to his landlord, the mortgagor, before it was due, and afterwards when it became due was notified by the mortgagee to pay rent to him, it was held that his previous payment to the mortgagor was no protection as against his liability to pay to the mortgagee. *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132; for the lessee's payment to the lessor is on the condition that the latter continues to be landlord. But see *Stone v. Patterson*, 19 Pick. 476.

§ 120. **Under Subsequent Lease, Tenant without Right at Common Law.** — The rights of a tenant, under a lease executed after a mortgage, stand upon different ground. A mortgagor in possession, according to the common law, is regarded, strictly, as a tenant at will to the mortgagee, who, being the legal owner, is entitled at law [in the absence of contrary covenants] to the immediate possession and to the receipt of rent if the land is in lease; and he may enter upon the mortgagor at any time, even before default, and eject him.¹ The mortgagor, consequently, has no power to make leases to bind a mortgagee; and when he collects rent, he is to be considered as receiving it in order to pay the interest which accrues on the mortgage, and only by an implied authority from the mortgagee until the latter determines his will as to possession. Hence, tenants under leases made subsequent to a mortgage may be treated as trespassers by the mortgagee, and ejected without notice.² By giving notice to such a tenant to pay rent to him, a mortgagee does not make him his tenant; and such result will not be produced unless the tenant attorns to the mortgagee for the express purpose of creating a new tenancy between himself and the mortgagee.³ If the mortga-

¹ *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Giles*, 5 Bing. 421, Cro. Jac. 659. If the mortgagor attorns to the mortgagee, he will become tenant of the latter on the terms mutually agreed or implied. *Morton v. Woods*, 9 B. & S. 632; *West v. Fritche*, 3 Exch. 216; *Jolly v. Arbutnot*, 4 De G. & J. 224; *Kearsley v. Phillips*, 11 Q. B. D. 621. But not if the attornment be a mere device to secure the mortgagee, as by giving him a right of distraint on the mortgagor's goods as against other creditors. *Jackson ex parte*, *Bowes in re*, 14 Ch. D. 725. A tenant who holds a mortgage on the demised premises, the money secured by which falls due on the day his lease expires, may continue to hold the premises under the mortgage (the mortgage-money not being paid) without first surrendering, although he has covenanted to surrender possession at the expiration of his term. *Shields v. Lozean*, 5 Vroom, 496.

² *Keech v. Hall*, 1 Doug. 21; *Rogers v. Humphreys*, 4 Ad. & E. 299; *Comer v. Sheehan*, 74 Ala. 452. So, although the mortgage was defective for want of an "affidavit of consideration," the lessee having notice of the mortgage. *Russum v. Wanser*, 53 Md. 92.

³ *Evans v. Elliott*, 9 Ad. & E. 342; *Towerson v. Jackson*, 1891, Q. B. 484. Accordingly where such notice was coupled with authority from the mortgagor to his tenant to pay the mortgagee, and this was withdrawn after several payments had been made to the mortgagee, it

gee accepts such person as tenant, he will become tenant to the mortgagee on such terms as are agreed upon, although he may be in possession under a lease for years from the mortgagor.¹

§ 121. **Like Rules in the United States.** — The common-law doctrine on this subject prevails in the United States² [except where it has been modified by statute³]; and on a lease was held, the tenant could not deny his tenancy to the mortgagor: *Wheeler v. Branscombe*, 5 Q. B. 373; but if the mortgagee had entered for condition broken, payment of rent by the tenant would have made him the mortgagee's tenant: *Doe v. Barton*, 11 Ad. & E. 307, 315. In *Wilton v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 H. & N. 716, the mere notice and demand by mortgagee were held insufficient to protect the tenant from paying the mortgagor, if he had not already paid the mortgagee; and the doctrine of *Pope v. Biggs*, 9 B. & C. 257, and *Waddilove v. Barnett*, 2 Bing. (N. C.) 538, that rent in arrear, at the time of such notice, could be safely paid to the mortgagee, was doubted; and the *dictum* that such notice of itself makes the lessee the mortgagee's tenant, or gives a right to rent subsequent thereto, was denied in *Evans v. Elliott*, *supra*. So in *Bartlett v. Hitchcock*, 10 Bradw. (Ill.) 87, it was held that a single act of the mortgagee in demanding rent would not make the lessee a tenant, when such demand had not been acted on, so as to enable the mortgagee to recover rent *eo nomine*. See *Drakford v. Turk*, 75 Ala. 339; § 121, *post*, n.

¹ *Doe v. Bucknell*, 8 C. & P. 566. It is a question of fact whether the purchaser at foreclosure sale has adopted the terms of the old tenancy; and though the mortgagee may have so done, this is not binding on the purchaser. *Smith v. Eggington*, L. R. 9 C. P. 145. Here the mortgagees, after giving notice to quit to the mortgagor's tenant, with a caveat that they thereby recognized no right to such notice, accepted rent up to the expiration thereof. This was held to bind them, but not the purchaser; and the fact that the latter also negotiated with the tenant about a lease, and meanwhile allowed him to remain in and supplied him with steam power, was held not conclusive evidence of a new tenancy. Where one of two co-owners of land mortgaged his interest therein prior to the leasing of the land to a third party, the lessee will be held to have accepted the lease with knowledge of the mortgagee's rights; and he is liable to a purchaser under foreclosure for one half the value of the use and occupation of the premises from the date of the foreclosure sale. *Harris v. Foster*, 97 Cal. 292.

² *Rockwell v. Bradley*, 2 Conn. 1; *Blaney v. Bearce*, 2 Greenl. 132; *Erskine v. Townsend*, 2 Mass. 493; *Odiorne v. Maxey*, 16 *id.* 39; *Simpson v. Ammons*, 1 Binn. 175; *McCall v. Lenox*, 9 S. & R. 302. But see *Jackson v. Green*, 4 Johns. 186.

³ See §§ 122, 124 *a*, *post*.

made prior to the mortgage, as the legal title vests at once by virtue of the mortgage,¹ the mortgagee as assignee of the reversion is generally entitled, without any attornment, to collect rent from the date of the mortgage, or if possession is reserved until breach, then upon a default, and after giving notice of his claim and requiring payment to himself; subject only to the qualification, that the rent has not already been paid in good faith to the mortgagor.² [And it is held that the mortgagee is entitled to the accrued rent, although he has not entered.³] As no relation of landlord and tenant exists between a mortgagee and the mortgagor⁴ [except by the mortgagor's agreement to pay rent after condition broken⁵]; or between the mortgagee and a tenant of the mortgagor by a demise subsequent to the mortgage, the tenant may be ejected like a mortgagor without notice to quit.⁶ On entry or demand by the mortgagee, the tenant may attorn and pay the after-accurring rent to him,⁷ upon a new tenancy, and is not liable

¹ *Blaney v. Bearce*, *supra*; *Erskine v. Townsend*, *supra*.

² *Kimball v. Lockwood*, 6 R. I. 139; *Russell v. Allen*, 2 Allen, 42; *Mansony v. Bank*, 4 Ala. 746; *Baldwin v. Walker*, 21 Conn. 168, 182; *Reed v. Bartlett*, 9 Bradw. (Ill.) 267.

³ *Mirick v. Hoppin*, 118 Mass. 582. And such rent will not be apportioned under a statute providing for apportionment where the lessor's estate is contingent; this provision being held not to contemplate the case where the lessor's estate is terminated by reason of his own neglect. *Adams v. Bigelow*, 128 Mass. 365. A note for rent in advance, given to the mortgagor, is liable to be defeated, even in the hands of an indorsee, by proof of notice by purchaser at foreclosure sale and payment to him. *Aldrife v. Riveyre*, 52 Ind. 182.

⁴ 4 Kent, Com. 149; *Doe v. Mace*, 7 Blackf. 2, 4; *Bank v. Hupp*, 10 Gratt. 23, 42, 49.

⁵ *Murray v. Riley*, 140 Mass. 490.

⁶ *Doe v. Mace*, 7 Blackf. 2; *Rockwell v. Bradley*, 2 Conn. 1; *Babcock v. Kennedy*, 1 Vt. 457; *Steadman v. Gresset*, 18 *id.* 346. If the mortgaged estate is sold, the lessee, if he has a covenant for quiet enjoyment, but not otherwise, is entitled to a share of the surplus proportionate to his unexpired term; *Clarkson v. Skidmore*, 46 N. Y. 297; *Burr v. Stenton*, 43 *id.* 462.

⁷ *Baldwin v. Walker*, 21 Conn. 168; *Welch v. Adams*, 1 Met. 494; *Mass. H. L. I. Co. v. Wilson*, 10 *id.* 126; *Cook v. Johnson*, 121 Mass. 826; *Hills v. Jordan*, 80 Me. 867; *Cavis v. McClary*, 5 N. H. 529. Though in New Jersey, only after actual entry. *Sanderson v. Price*, 1 Zab.

upon the old lease;¹ and where the action of ejectment is used, all rent accrued after the demise laid therein can be recovered by the mortgagee.²

§ 122. **Mortgagee's Right limited in Certain States.** — But the common-law rules of mortgage have been modified in many of the States, and the right of the mortgagee to collect rent somewhat limited; thus, in Vermont, he has no legal estate in the land, nor, consequently, any right of action until condition

637; *Price v. Smith*, 1 Green Ch. 516. And if he has paid in advance he is not liable for the same rent to a purchaser who bought the land without notice of such payment. *Stone v. Patterson*, 19 Pick. 476. See *Lucier v. Marsales*, 133 Mass. 454. He is not bound to attorn, and may treat the foreclosure as an eviction. *Simers v. Saltus*, 3 Denio, 214.

¹ *Gartside v. Outley*, 58 Ill. 210. But the terms of the old lease may be adopted by express agreement or clear implication. *Ibid.* But the doctrine of *Pope v. Biggs*, 9 B. & C. 257, seems to have been followed in *Hutchinson v. Dearing*, 20 Ala. 798; *Clark v. Abbott*, 1 Md. Ch. 474; which cite that case as law in England, although it has been overruled. See § 120, *supra*, n. In *Henshaw v. Wells*, 9 Humph. 568, it is even held that rent actually paid the mortgagor can be recovered back. But this is not contended even in *Pope v. Biggs*, and seems untenable. In *Duff v. Wilson*, 69 Pa. St. 316, a purchaser at the foreclosure sale was held to stand on the same footing as a purchaser at a sale on execution, and entitled as assignee of the reversion. In *Austin v. Ahearne*, 61 N. Y. 6, 18-21, the doctrine of *Pope v. Biggs* is referred to with apparent approval, and the right of the mortgagee, after notice to or attornment by the lessee, is put on the same footing as that of a voluntary grantee of the lessor; and all distinction between leases prior and subsequent to the mortgage is disregarded. But these decisions ignore the fact that the mortgagee's assertion of title is an eviction, and that the lease is thereby at an end, and the tenant in attorning to the mortgagee acknowledges his title but does not revive the lease, unless this is expressly agreed so as to create a new lease. The doctrine of the text is followed in *Kimball v. Rowland*, 6 R. I. 138. And see *Cook v. Johnson*, *supra*, and *Corbett v. Plowden*, 25 Ch. D. 678.

² *Babcock v. Kennedy*, *supra*; *Bank v. Hupp*, 10 Gratt. 23, 29. And see *Turner v. Coal Co.*, 5 Exch. 932; *Litchfield v. Ready*, *id.* 939. A. at an execution sale bought realty subject to a mortgage made by B. B. surrendered the premises to the mortgagee. A. brought ejectment against B., who was occupying the realty. It was held, that B. might show a permissive occupation under the mortgagee which would make B. a tenant at will of the mortgagee, and thus defeat A.'s action by the mortgagee's superior title. *Wilcox v. Wilbur*, 15 R. I. 434.

broken.¹ In Pennsylvania, Michigan, Georgia, and South Carolina, a mortgage is only security for a debt, and no estate vests until after foreclosure and sale;² and in California no estate at all passes by the mortgage until after foreclosure.³ The common-law rules, however, apply in the New England States, and in Indiana, North Carolina,⁴ Mississippi, and Minnesota.⁵ [It is to be observed that now, generally, the mortgagee's common-law right to take the rents is restricted by stipulation in the mortgage.]

§ 123. **In New York. — Mortgagee's Equitable Remedy.** — In New York, the statutes have abolished the action of ejectment by a mortgagee, thereby compelling him to rely upon a special contract for possession; denying his right to the rents and profits so long as the land is a sufficient security for the debt; and turning him over to equity for a foreclosure and sale, as his chief remedy. The mortgagee is only entitled to have a receiver of the rents and profits appointed, after it shall appear that the property is not of value sufficient to satisfy the mortgage debt and costs, and that the mortgagor, or other person personally liable for the debt, is irresponsible, or unable to pay the deficiency. And where under such circumstances the defendant in a suit to foreclose is in possession by his tenant who is not a party to the suit, the possession of the tenant

¹ *Babcock v. Kennedy*, 1 Vt. 457; *Cheever v. Rut. & B. R. R.*, 39 *id.* 653; *quære*, in Alabama, see *Smith v. Taylor*, 9 Ala. 633.

² *Myers v. White*, 1 Rawle, 353; *Ladue v. Detroit*, 13 Mich. 394; *Ragland v. Justices*, 10 Ga. 65; *State v. Laval*, 4 McCord, 336. In Iowa, Code, § 2013, the tenant's attornment to the mortgagee is void unless made "after the mortgage has been forfeited," which words are taken to intend after the mortgage has been foreclosed and the period of redemption expired; and the mortgagor is entitled to possession during the year allowed for redemption. *Mills v. Hamilton*, 49 Iowa, 105.

³ *Bullock v. Rogers*, 9 Cal. 123; *Polhemus v. Trainer*, 30 *id.* 685; and see 2 Washb. Real Prop. (3d ed.) 99-109.

⁴ But see *Dunn v. Tillery*, 79 N. C. 497.

⁵ See § 124 *a, post.* In California, a sale under foreclosure does not entitle the purchaser to the whole rent; but he is entitled, under Code, § 707, only to an apportionment of the rent, in proportion to the unexpired part of the lease-year existing after the purchase. *Clark v. Cobb*, 121 Cal. 595.

will not be disturbed by the appointment of a receiver of rents ; but he may be ordered to attorn to the receiver and pay rent to him.¹

§ 124. **In Massachusetts, Mortgagor in Possession entitled to Rents.** — In Massachusetts, it is held that a mortgagor, so long as he remains in possession or until actual entry by the mortgagee, may receive the rents and profits and is not liable to account for them to the mortgagee.² Nor is he liable for such rent as may accrue between the [default and the mortgagee's entry to foreclose³]. So, if a person demises an estate for a term of years, reserving rent, and afterwards mortgages the same estate to the lessee in fee, and the mortgagee refuses to pay rent, the rent is suspended until the condition is performed or the estate redeemed. During the suspension, the lessee will be accountable for the profits, as mortgagee, towards the discharge of the interest and principal of the debt ; and, if he voluntarily pays the rent, he will not afterwards be accountable, as mortgagee, for the profits during the same time.⁴ We

¹ *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Shotwell v. Smith*, 3 Edw. 588. After such payment the mortgagor has no authority to accept a surrender, or to execute a new lease of the premises, during the continuance of the receivership. *Nealis v. Bussing*, 9 Daly, 305.

² *Boston Bank v. Reed*, 8 Pick. 459; *Gibson v. Farley*, 16 Mass. 280.

³ *Mayo v. Fletcher*, 14 Pick. 525.

⁴ *Newall v. Wright*, 3 Mass. 138; Pub. Sts. c. 181, § 23; and see *Sanford v. Pierce*, 126 Mass. 146. The purchaser at a foreclosure sale is not entitled to the rents accruing between the time of purchase and the delivery of the deed. *Cheaney v. Woodruff*, 45 N. Y. 98. Where a lessor gave an order for value received to a lessee, which was accepted, to pay the accruing rent to a third person, and afterwards mortgaged the property ; and the mortgagee bought it in under a foreclosure, with knowledge of the facts, he was held estopped from claiming the rent so assigned. *Abrams v. Sheehan*, 40 Md. 446. If a tenant, with the assent of his landlord, pays interest upon a mortgage charged on the premises demised, it is equivalent to a payment of rent *pro tanto*. *Dyer v. Bowley*, 9 Moore, 196; 2 Bing. 94. Where a mortgagee becomes lessee of the mortgaged premises, and covenants to pay rent to the mortgagor until condition broken, he is bound by his covenant and cannot set up his mortgage against the lease. But if a lessee, after covenanting to pay rent, takes a mortgage of the leased premises, he is released from his covenant until the condition of the mortgage is performed or the estate is redeemed. *Newall v. Wright*, *supra*. See *Russell v. Allen*, 2 Allen, 42.

may observe that a lessee, or his assignee, may always, in order to protect his own interest, redeem a mortgage covering the demised premises and given by the lessor, prior to the lease; and it makes no difference if the leasehold premises consist of but part of the lands covered by the mortgage.¹

[§ 124 *a*. **Right to the Rents and Profits follows the Right to Possession.** — It is apprehended to be a general rule that, as between the mortgagor or owner of the equity of redemption on the one hand and the mortgagee and his representatives on the other, the right to possession is the criterion of the right to take the rents and profits; whether the right of possession is to be determined by the construction of the instrument of mortgage, or whether it is acquired under a decree or judgment of court, by a common law or statutory entry to foreclose, or by a sale under a power in the deed.² Thus it is held that the mortgagee has no right to rent, so long as he is restricted from possession by stipulation in the mortgage,³ and so if the mortgagor holds over;⁴ and that the mortgagee cannot, before condition

¹ *Averill v. Taylor*, 8 N. Y. 44. Upon the redemption, the redeeming party has a right to an assignment of the mortgage; and, if it be recorded, to require the mortgagee to acknowledge the assignment. If the lessee entitled to redemption is not made a party to the foreclosure proceedings, a judgment therein is inconclusive as against him. *Lockhart v. Ward*, 45 Tex. 227.

² In the United States the general rule, even in those States where no change has been made by statute in the rule at common law, is that, until condition broken, though the title to mortgaged property passes to the mortgagee, he holds it merely as security, and not until after a breach has he the right to enter upon the mortgagor or to maintain ejectment against him. The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession. It is, however, well settled that no contract of lease or otherwise which the mortgagor may make with respect to the land either enures to the benefit of the mortgagee or is binding on him. There is in such a case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease and releases the lessee from any obligation. *Western Union Tel. Co. v. Ann Arbor R. R.*, 61 U. S. App. 741.

³ *Smith v. Taylor*, 9 Ala. 633.

⁴ *Mayo v. Fletcher*, 14 Pick. 525. See *Morse v. Stafford*, 95 Me. 31.

broken, recover rent due from the mortgagor's tenant, which accrued under a lease made subsequent to the mortgage. If the mortgagee is entitled to possession for condition broken, he must enforce his rights as provided in the mortgage, and give the tenant notice before he can recover rent;¹ and if he takes possession before foreclosure he is required to account for the rents and profits received, or for a fair cash rent.² Where the rent was payable in advance, and the mortgagee took possession after condition broken, as he had a right to do by statute, upon the first day of the quarter in which the rent was payable, it was held, that, inasmuch as the tenant had the whole of the day to make the payment in advance, and the mortgagee entered on that day and ousted him, the tenant had a sufficient excuse for not paying the rent to the mortgagor.³ Where the proceedings to foreclose are in equity, the owner of the equity of redemption is entitled to the rents and profits of the mortgaged premises until the purchaser under the decree of foreclosure becomes entitled to the possession. If the rent becomes payable between the day of sale and the time when the purchaser will be entitled to possession by the terms of the decree, such rent belongs to the owner of the equity of redemption, and not to the purchaser at the master's sale. But if the proceeds of sale are insufficient, or probably insufficient, to pay the amount due on the mortgage, and the mortgagor or his representative is insolvent, the plaintiff is entitled to a receiver to collect the rent, and have it applied to the payment of the deficiency.⁴ After the sale, a tenant in possession, who was made a party to the suit, is bound to pay rent to the purchaser, notwithstanding he holds under an unexpired lease executed by the mortgagor prior to the mortgage; and, if he refuses, may be removed by proper process. And it is not material that the original lessee, from whom the lease came by assignment to the tenant in possession, was not made a party to the foreclosure.⁵ Where the conveyance was

¹ *White v. Wear*, 4 Mo. App. 341.

² *Van Buren v. Olmstead*, 5 Paige, 9.

³ *Smith v. Shepard*, 15 Pick. 147.

⁴ *Clason v. Corley*, 5 Sandf. 447; *Astor v. Turner*, 11 Paige, 436; *Howell v. Ripley*, 10 Paige, 43; *Bank v. Hupp*, 10 Gratt. 23.

⁵ *Lovett v. German Ref. Church*, 9 How. Pr. 220.

absolute in form, with agreement to reconvey on repayment of the purchase-money and interest, the grantor to retain possession of the premises during the term, it was held that, during the term, the grantor only could maintain action for rent against the tenants of the property.^{1]}

§ 125. **Mortgagor and Mortgagee to join in Lease.** — It is obvious that an effectual lease of mortgaged land can be secured only by the concurrence of both mortgagor and mortgagee, the former to demise and lease, the latter to ratify and confirm. Such a lease will operate during the continuance of the mortgage as the demise of the one and the confirmation of the other; but after the mortgage has been paid off, as the demise of the latter and the confirmation of the former.² Where both concur in the grant, the covenants on the lessee's part should be with the mortgagee, with a view to their running with the land. If entered into with the mortgagor, they are merely covenants in gross, and so of no value to an assignee of the mortgage.³ It seems clear that a mortgagor cannot enforce the specific performance of a contract to take a lease, without first redeeming the mortgage, or obtaining the mortgagee's concurrence in the lease; though a party claiming under such a contract cannot compel the mortgagor to pay off the mortgage, in order to give effect to the lease.⁴

SECTION VII.

BY CORPORATIONS.

§ 126. **Aggregate may lease as Natural Persons.** — **Unincorporated Associations.** — Every corporation aggregate⁵ has,

¹ *Goodwin v. Hudson*, 60 Ind. 117.

² *Doe v. Adams*, 2 Cr. & J. 232.

³ *Webb v. Russell*, 3 T. R. 393, 679. Thus on a lease by mortgagor and mortgagee, reciting the mortgage and reserving rent, with right of re-entry for non-payment thereof to the mortgagor, the lessee is not estopped to deny the mortgagor's title in ejectment for breach of condition to pay rent, brought by the assignee of mortgagor and mortgagee. *McAreavy v. Hannan*, 13 Ir. C. L. 70; *Saunders v. Merryweather*, 13 W. R. 814.

⁴ *Costigan v. Hastler*, 2 Sch. & L. 160.

⁵ A corporation aggregate is a collection of individuals united in one

unless specially restrained by its charter or by statute, a common-law right to hold, enjoy, and transmit such property as may be necessary to enable it to answer the purposes of its creation;¹ it may, consequently, make leases for a term of years, or for the life of the lessee, or at will, to the same extent that an individual may, provided they are not inconsistent with its corporate rights and responsibilities.² As a general rule, a corporation must grant as well as take by its corporate name; but an immaterial variance of name, or even a misnomer, will not avoid its grant or disenable it to take, when the true name can be collected from the instrument or is shown by proper averments.³ And the same principles are

body under such a grant of privileges as secures a succession of members without changing the identity of the body and constitutes the members one artificial person, or legal being, capable of transacting some kind of business, like a natural person. *People v. Assessors*, 1 Hill, 620.

¹ *People v. Utica Ins. Co.*, 15 Johns. 383; *McCartee v. Orphan Asylum*, 9 Cow. 437; *Mayor v. Lowten*, 1 Ves. & B. 226-240. This common-law right has been restricted in England since the time of Elizabeth, as to religious corporations; and such restraining acts have been generally followed in this country. In New York, it is understood that no religious corporation can sell in fee its real estate without an order of court; but it may by statute demise, lease, and improve the same for the use of the congregation. This limitation of the power to sell is confined to religious corporations; and all others can buy and sell, except so far as they may be restricted by their charters. 2 Kent, Com. 281. Under Rev. Sts. U. S. § 5136, a lease at large rent of an office to be occupied "as a banking office, and for no other purpose" for a term of five years, executed by a national bank as lessee, after having filed its articles of association and organization certificate with the Comptroller of the Currency, but not having been authorized by him to begin the business of banking, is void, cannot be made good by estoppel, and will not support an action for rent under it beyond the value of what it has actually received and enjoyed. *McCormick v. Market Bank*, 165 U. S. 538.

² *Reynolds v. Comm'rs*, 5 Ham. 205; Co. Lit. 44, a. And see *Curtis v. Leavitt*, 15 N. Y. 9, 62, 219, 262. But if a mode of exercising the leasing power is prescribed, this must be followed strictly. *Taylor v. Beebe*, 3 Rob. (N. Y.) 262; *Ready v. Mayor*, 20 N. Y. 312, and the limit to the rights and obligations of the lease are to be found in the lessor's charter, not in the lessee's. *Penn. R. R. v. Sly*, 65 Pa. St. 85, 205.

³ *N. Y. Inst. for the Blind v. How*, 10 N. Y. 84; *Sutton v. Cole*, 3 Pick. 237; *Minot v. Curtis*, 7 Mass. 444; *Chancellor of Oxford's Case*, 10 Co. 57. The name of the corporation need not be *idem syllabis aut verbis*: it is sufficient that it be *idem re et sensu*. *Mayor of Lynn's Case*, *id.* 124.

applicable to the granting of a term for years, as of the fee.¹ [It is to be observed that a mere community of individuals, not incorporated, cannot take real estate in succession. Thus under a grant to three persons named, for themselves and their associates, being a settlement of friends at, &c., to have and to hold as tenants in common for themselves and their associates, the estate vests only in the three persons named.²]

[§ 126 *a*. **Railway Corporations as Lessors and Lessees.** — Not only is a railway corporation, like all other corporations, a creature of its charter, deriving all its powers therefrom, but it is delegated, by virtue of its franchise, with a limited exercise of the right of eminent domain, and charged with peculiar duties towards the public as a carrier of persons and merchandise. Considerations of public policy, therefore, lie at the foundation of the rule that acts of a railway corporation, not necessary to the carrying on of the business for which it is incorporated, are *ultra vires*, and so invalid, unless specially authorized by law. So, while natural persons, lessees, may sublet or assign, unless restrained from so doing by the covenants or conditions in the lease,³ a railroad company cannot transfer or lease the right to operate its road, so as to absolve itself from its duty to the public, without legislative

¹ Angell & A. Corp. 60; N. Y. Afr. Soc. v. Varick, 13 Johns. 38; Berks Co. v. Myers, 6 S. & R. 12; Inhab. Alloway Cr. v. String, 5 Halst. 322; Sutton v. Cole, *supra*.

² Jackson v. Sisson, 2 Johns. Cas. 321; Co. Lit. 3, a; Jackson v. Cory, 8 Johns. 385; Hornbeck v. Westbrook, 9 *id.* 73. A lease which names an association as lessee, and declares that the association acts by certain of the signers as directors, is the deed not of the association but of the signers, if it is executed in their names and with their seals. It is immaterial that the signers on the part of the association act, and are understood to act, as directors and not otherwise, for, the association being unincorporated, they act for themselves as well as for their associates and are therefore bound. Pelton v. Place, 71 Vt. 430. While an unincorporated association is not competent to acquire an interest in lands by deed or grant, yet it may, through its officers or members, enter into a valid lease of premises for its use. Accordingly, a lease of a hall made to a post of the Grand Army of the Republic, signed on behalf of the post by its principal officers, and ratified by the post, is binding on the lessor. Reding v. Anderson, 72 Iowa, 498.

³ See §§ 108, *ante*, 426, *post*.

authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the authority contains a provision to that effect.¹ Among the duties with which a railway corporation is charged is that of so operating its road as not negligently to injure the persons and property of strangers. It is clear that if the lease of a railroad is invalid, because made without legislative sanction, the lessor continues liable for all negligence of the lessee affecting the public, and the lessee is to be treated as operating the road as agent of the lessor,² or the lessor and the *quasi* lessee may be jointly or severally liable for the results of such negligence. When, however, the lessor company is sought to be made liable for the negligent management of the road which it was authorized to lease, and of which negligent management it had no control, it seems to be a sound rule which holds that no reasons of public policy exist which impose a liability on the lessor company with respect to injuries resulting to individuals from such negligent management; and the fact that a statute granting authority to a railway company to lease its railway provides no special exemption from such liability does not make the lessor company liable therefor.³ But the legislature may, of course, as a

¹ *Railroad Co. v. Brown*, 17 Wallace, 445; *Hayes v. Northern Pacific R. R.*, 46 U. S. App. 41; *Nelson v. Vermont & Canada R. R.*, 26 Vt. 717; *Abbott v. Horse R. R. Co.*, 80 N. Y. 27; *Ohio & Miss. R. R. v. Dunbar*, 20 Ill. 623; *Macon & Augusta R. R. v. Mayes*, 49 Ga. 355; *George v. Central R. R. & Banking Co.*, 101 Ala. 607; *Railway v. Morris*, 68 Tex. 49.

² *Lee v. Southern Pacific R. R.*, 116 Cal. 97.

³ *Hayes v. Northern Pacific R. R.*, 46 U. S. App. 41; *Arrowsmith v. Nashville & D. R. R.*, 57 Fed. Rep. 165. It is said: "To a certain extent this proposition is true: if the injury results from negligence in the handling of trains, or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could in the nature of things have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance—something connected with the building of the road—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company. Per Brewer, J., in *St. Louis, Wichita & Western R. R. v. Curl*, 28 Kan. 622.

condition of the permission to lease, provide that the obligation, in this respect, of the lessor corporation, shall continue; and it is held that, under the law of Illinois, the tort of the lessee company as operating the road is to be imputed to the lessor company because it cannot absolve itself from its responsibility in that regard; and, in the case of injury, it is the option of the injured party to sue either the lessor or the lessee corporation, or both corporations jointly.¹ While a railway lease made without legislative authority is invalid and ineffectual as against the rights of the public, or of third persons, such a lease is not, of itself, in the absence of fraud, invalid as between the parties, and equity will not so declare it, at the instance of the lessor, or lessee, on the ground of *ultra vires*, after the lease has been executed, and the lessor has enjoyed some of the benefits of it. It is said that the instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price, and that it would be difficult to imagine a contention with less merit, and the law would be exceedingly impotent were it to allow it to succeed.² While railway leases conveying the franchise and transferring the public duties of the lessor corporation are

¹ *Anderson v. West Chicago Street R. R.*, 200 Ill. 329; *Pennsylvania Co. v. Ellett*, 132 Ill. 654; *Chicago & W. I. R. R. v. Doan*, 195 *id.* 168; *West Chicago R. R. v. Horne*, 197 *id.* 250. See, also, *Norton v. Railroad*, 122 N. C. 910; *Kenney v. Railroad*, *id.* 901; *Benton v. Railroad*, *id.* 1007; *Smith v. Railroad*, 130 *id.* 344; *Davis v. Railway*, 63 S. C. 370.

The question whether a condition in a lease by a railway company of a portion of its right of way, that the company shall not be liable to the lessee for any damage to any buildings or personal property thereon, caused by fire set by its locomotives, or by the negligence of its servants, is in violation of public policy, is a question of general law, and not dependent solely upon any local statute or usage. Over this question the National courts exercise concurrent jurisdiction with those of the State, and while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment. *Hartford Fire Ins. Co. v. Chicago, &c. Ry. Co.* 36 U. S. App. 152.

² *Pittsburg R. R. v. Altoona R. R.*, 196 Pa. 452; *Wright v. Pipe Line Co.*, 101 *id.* 204, and see *Oil Creek & Alleghany River R. R. v. Penn. Transportation Co.*, 83 *id.* 160. So a lease for one hundred and ninety-nine years by one railroad company to another of its road and franchise which is *ultra vires* of one or both, will not be set aside in

invalid unless executed under a legislative sanction, yet leases made for the purpose of more conveniently transacting the business of the lessee company,¹ or even for furnishing better facilities for the business of the lessor company in the way of increased business,² may be valid under the general charter powers of the corporation.³ The conditions or covenants contained in a railway lease are to be construed by the same rules, and enforced, generally, in the same manner as are the covenants and conditions in leases made by natural persons.⁴ Thus the covenant by a lessor to build the railroad is not to be distinguished from the covenant of a landlord to improve or repair leased premises after possession given; in which case a breach of the covenant to repair or improve is no defence to an action for rent under the lease.⁵ But it is to be observed that in many jurisdictions, for reasons of public policy and convenience, the rolling-stock and other movables of railway corporations are made exempt from attachment on mesne process, or distress for rent.⁶]

equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to rescind the contract. *St. Louis, V. & T. H. R. R. v. Terre Haute & I. R. R.*, 145 U. S. 393.

¹ *Kugel v. Painter*, 166 Pa. 593.

² *Michigan Central R. R. v. Ballard*, 120 Mich. 416.

³ See *Grand Trunk R. R. v. Richardson*, 91 U. S. 454; *Roby v. Railroad*, 142 N. Y. 176; *Gurney v. Elevator Co.*, 63 Minn. 70. Thus it is not beyond the powers of a corporation authorized to construct, maintain, and operate a railroad and its appurtenances to let by contract to a like corporation its surplus rolling-stock, or the surplus use of its terminal tracks, depots, and bridges, which it has necessarily acquired for the purposes of its incorporation, provided always that such contract in no way disables it from the full performance of its obligations and duties to the State and public. *Omaha Bridge Cases*, 10 U. S. App. 98. It is within the chartered powers of a railway company, when no legislative prohibition is shown, to lease and maintain a summer hotel at its terminus. *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514.

⁴ As whether the covenants are dependent or independent. *United Pacific Railway v. Travelers' Ins. Co.*, 49 U. S. App. 752. See *Charlotte, Columbia & Augusta R. R. v. Chester, &c. R. R.*, 118 N. C. 1078 as cited § 136 *a*, *post*.

⁵ *Central Appalachian Co. v. Buchanan*, 43 U. S. App. 265.

⁶ *Pittsburg R. R. v. Altoona R. R.*, 196 Pa. 452. Where a railroad

§ 127. **Bound by Parol Contracts of Directors and Agents.** — A corporation at common law could do no act, except by writing under its corporate seal; but this doctrine has been relaxed in England,¹ and is repudiated in the United States, it being held, generally, that whenever a corporation aggregate is acting within the scope of the objects of its creation, all parol contracts made by its authorized agents are binding upon it;² and that a bank, or other commercial corporation, may bind itself, by a vote of its board of directors, or by the acts of its authorized officers and agents, without the corporate seal.³ [The authority of the president of a corporation to execute a lease in its name may be inferred from the facts of his signing, sealing, and delivering the instrument, and of the corporation's entering into possession under it, and exercising acts of ownership over the leased premises; although the minutes of the company fail to disclose authority expressly given.⁴] The modern decisions, in effect, place cor-

company holds rolling-stock under a car-trust lease, the title thereto remaining in the lessor until the rental has paid the purchase price, the lessor is entitled to reasonable compensation as rental for the use of such rolling-stock by the receiver of the railroad company, even though the cars are afterward returned to the lessor. *Central Car Trust Co. v. Harris*, 55 U. S. App. 452.

¹ *East London Water-works v. Bailey*, 4 Bing. 283.

² *Bank v. Patterson*, 7 Cranch, 299; *Buff. Com. Bank v. Kortright*, 22 Wend. 348; *Kelley v. Mayor*, 4 Hill, 263.

³ *Fleckner v. U. S. Bank*, 8 Wheat. 338; *Mott v. Hicks*, 1 Cow. 513; *Chestnut Hill Co. v. Rutter*, 4 S. & R. 16; *Danforth v. Schoharie Co.*, 12 Johns. 227; *Coppinger v. Armstrong*, 8 Bradw. (Ill.) 210. So if the lease is executed by the corporation's agent. *Crawford v. Longstreet*, 14 Vroom, 325. Where a committee appointed by a corporation to execute, as lessees, a lease purporting to run to the corporation, without words to show in whose behalf they executed the lease, and the corporation ratified the action of the committee and entered and occupied under the lease, it was held that the corporation was liable for the rent reserved in the lease and could not terminate its estate by a notice sufficient to determine a tenancy at will. *Carroll v. St. John's Society*, 125 Mass. 565. And see *Crawford v. Longstreet*, *supra*.

⁴ *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514. A lease of the land of a corporation, made without authority by the president and treasurer of the corporation to the president, may be ratified and affirmed by the stockholders. *Mt. Wash. Hotel Co. v. Marsh*, 63 N. H. 230.

porations, with regard to their mode of making contracts, upon the same footing with natural persons. They may contract under seal, but they are no more obliged to do so than are individuals. Like natural persons they are subject to the rules established by law and cannot take or grant interests in land, otherwise than by deed, when like interests can only be so taken or granted by individuals. Thus corporations may make parol leases in the same manner and under the same restrictions that natural persons may.¹ [One who contracts with a corporation through persons professing to represent it, and by virtue of such contract gets possession of the property as lessee, and holds it until the expiration of the term of the lease, with full knowledge of the facts, is estopped to deny that the corporation was properly incorporated and officered, and that it is the owner of the leased property.²]

§ 128. **Majority of Directors may bind.** — The directors are, for all business purposes, the corporation; and they may authorize a committee or an officer to lease or otherwise dispose of the real estate of the corporation; and that power implies authority to affix the corporate seal where it may be necessary.³ A majority of the directors are competent to

¹ *U. S. Bank v. Dandridge*, 12 Wheat. 105; *Osborn v. U. S. Bank*, 9 *id.* 738; *Garvey v. Colcock*, 1 N. & McC. 231. In *Ecc. Comm'rs v. Merril*, L. R. 4 Exch. 162, a tenancy from year to year was created by entry and occupation of land of an ecclesiastical corporation under a demise not sealed with their common seal.

² *Waterworks v. Tillinghast*, 119 N. C. 343, and see § 126 *a*, *ante*. So a lessee cannot, in the face of the terms of a written lease and an assignment thereof, relieve himself of personal liability by showing by parol evidence that he was acting as the agent of a proposed corporation, at least without showing that the execution of the lease was induced by fraud or misrepresentation. *Sanders v. Sharp*, 153 Pa. 555. The fact that the solicitor of a company had control of its legal business is not proof of his authority to accept surrender of a lease, or abandonment of the premises. *Jamestown & Franklin R. R. Co. v. Egbert*, 152 Pa. 53.

³ *Burrill v. Bank*, 2 Met. 163; *Decker v. Freeman*, 3 Greenl. 338. A corporation can act only in the mode prescribed by the law creating it. *Beatty v. Mar. Ins. Co.*, 2 Johns. 109; *Head v. P. I. Co.*, 2 Cranch, 127, 166. Where a charter provided that the president and one third of the directors should constitute a quorum to transact business, and that all business might be transacted by committees, without the presence of the

act.¹ It is obvious that a corporation may accept, and will be bound by a lease, whenever the contract is within the scope of its corporate authority. And where a corporation entered upon and enjoyed premises pursuant to a lease purporting to be made by its agent and paid rent thereon, it was held that it was bound by the lease, and that the authority of the agent to contract for it could be proved as well by [paying rent or other] subsequent ratification of his acts as by direct evidence of his appointment.² [It is held that the directors of a bank completely organized and incorporated under the National Banking Act except that it has no certificate from the comptroller authorizing it to act, are not liable as copartners on a lease entered into for business headquarters, as in such case they are not acting as agents of an assumed corporation, but of a corporation *de jure*, as yet powerless to make a lease.³]

§ 129. *Seal of, Necessary in Deed. — How affixed and proved.* — Although a corporation may execute parol leases without the use of the corporate seal, its seal is necessary when a seal would be required if the instrument were to be executed by an individual. But the corporate seal, when affixed to a contract or conveyance, does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized to execute the instrument, or he is acting in pursuance of a vote of the directors.⁴ In order to authenticate the instrument, it will be necessary to prove the corporate seal in the same manner as the seal of an individual; for the common seal is not evidence of its own authenticity, but must be proved to be such, not indeed, by full board, it was held that the president alone had not power to act. *Dawes v. N. Riv. Ins. Co.*, 7 Cow. 462.

¹ *Angell & A. Corp.* § 291. Where two trustees, being a corporation, signed their names separately to a lease and affixed the corporate seal to each name, it was held to be well executed. *Jackson v. Walsh*, 3 Johns. 226.

² *Long Island R. R. v. Marquand*, 6 N. Y. Leg. Obs. 160; see *Hoyt v. Thompson*, 19 N. Y. 207; *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514; *Welsh v. Ferd. Hein Brewing Co.*, 47 Mo. App. 608.

³ *Seeberger v. McCormick*, 178 Ill. 404.

⁴ *Jackson v. Campbell*, 5 Wend. 572; *Bank v. Dandridge*, 12 Wheat. 68; *Derby Canal Co. v. Wilmot*, 9 East, 860.

one who saw it affixed, but by one who knows it to be the seal of the corporation it purports to be.¹ When the seal is affixed to the deed, it is *prima facie* evidence that it was affixed by the authority of the corporation; provided it is also proved to have been affixed by an officer intrusted by the corporation with the custody of such seal. And it lies with the party objecting to the due execution of the deed, to show that the corporate seal was affixed surreptitiously or improperly; and that the preliminary steps necessary to authorize the officer having the legal custody of the seal to affix it have not been taken.²

SECTION VIII.

BY TRUSTEES.

§ 130. **May grant Leases.** — *Cestui que trust* to join. — Trustees of land, being the owners of the legal estate, may grant valid leases of the estate which they possess.³ If there are several trustees, all must act; for they have a joint authority, and therefore the lease of one is void.⁴ A party taking a lease from trustees with notice of the trust, without the concurrence of the person who is beneficially interested, is himself a trustee, and subject to the control of a court of equity. But [it is held that] the lessee of a *cestui que trust* acquires no interest without the concurrence of the trustee; he is a mere trespasser as against the trustee, and is liable to an eviction at law without notice to quit.⁵ It is therefore expedient, as in the case of a mortgagor and mortgagee, that the trustee and *cestui que trust* should both join in a demise.⁶

¹ *Jackson v. Pratt*, 10 Johns. 381; *Foster v. Shaw*, 7 S. & R. 156; *Den v. Vreelandt*, 2 Halst. 352.

² *Lovett v. Steam Saw-mill Co.*, 6 Paige, 54; *Clarke v. Imp Gas Co.*, 4 B. & Ad. 315.

³ *Hutcheson v. Hodnett*, 115 Ga. 990.

⁴ *Sinclair v. Jackson*, 8 Cow. 543; Story, Eq. § 1062.

⁵ *Blake v. Foster*, 8 T. R. 487, 492. See *White v. Cannon*, *infra*, § 131, *post*.

⁶ The trustee should *demise and lease*, and, on the part of the *cestui que trust*, words of demise should be inserted, as well as words of *consent and approbation*.

If there are several beneficiaries, the concurrence of all is necessary ; for if a trustee under a will concur with some, but not all of them, in a lease which recites part only of the trust, the lessee cannot hold in opposition to the other beneficiaries, who are not parties to the lease, since such a recital renders it incumbent on him to make further inquiry, and he is to be considered as having had notice of the title of the other claimants under the will.¹ The rent may be reserved generally during the term, without specifying to whom it is to be paid, leaving the law to appropriate it ; but the covenants, in order to make them run with the land, should be with the trustee.² [It is held that where a mere naked trustee, with the consent of the *cestui que trust* having the beneficial title and right to the possession, leases the trust property, the leasing is to be regarded as the act of the *cestui que trust*.³]

§ 131. **Duration of Leases by Trustees may exceed Limits of the Trust Estate.**— Trustees holding the fee may, however, make valid leases of the estate they represent ; and a due execution of the trust usually requires them to exercise this power. The duration of such leases must be for a reasonable period, to be ascertained from the circumstances of each case ; but they may extend beyond the duration of the trust estate, subject to the jurisdiction of equity to annul them if unreasonable or improper. Where a testator devised his real estate to trustees, upon the trust that out of the yearly rents and profits they should pay certain annuities ; and, subject thereto, should permit a person to receive the rents and profits for life ; and, after his decease, permit his wife to receive them for her life, with limitations over in favor of their children ; the trustees were held to have power to demise for ten years.⁴ So a trust created by will to receive the rents and profits of an unoccupied and unincumbered real estate which was liable to large taxes and assessments, for the lives of the testator's children, and out of the same to uphold, support, and repair, as well as to pay all charges on

¹ *Malpas v. Ackland*, 3 Russ. 273.

² *Webb v. Russell*, 3 T. R. 393 ; s. c. 1 H. Bl. 562.

³ *White v. Cannon*, 125 Ill. 412.

⁴ *Att'y-Gen. v. Owen*, 10 Ves. 550–560.

the land, was held to authorize a lease for twenty-one years, with a covenant to renew or to pay for buildings to be erected by the lessee.¹ But with reference to a devise to A. in fee, in trust for his infant son, to be conveyed to him at the age of twenty-one years, and, without imposing terms upon the trustees as to the rent, or the length or terms of lease, Lord Eldon held, that, although the trustees might do what was reasonable, they could not alienate the land for a term of ninety-nine years at a stationary rent.²

§ 132. **Trustees' Leases, when void in Equity.** — Whatever may be the term for which the lease is granted, the burden of proving its reasonableness devolves upon the trustee, and the lessee claiming under him. The principle upon which equity will interfere with leases made by a trustee rests on a presumption that the lessor has been guilty of a breach of trust in making, and the lessee has made himself accessory to that breach of trust in accepting, an improper lease. Thus a suspicion of mismanagement will attach to a lease made for a long term of years absolute, at a stationary rent, because no man of reasonable prudence would so let his own estate;³ and it is said, that, generally speaking, neither an alienation by trustees for ninety-nine years, if a mere husbandry lease and without adequate consideration,⁴ nor a lease for seventy years or more at an unvarying rent, can be upheld, — the value of such interests being but little inferior to the value of the inheritance and no other consideration than the rent forming an inducement to the contract.⁵

¹ *Greason v. Keteltas*, 17 N. Y. 491.

² *Naylor v. Arnitt*, 1 Russ. & M. 501; *Att'y-Gen. v. Owen*, *supra*. Where a testator devised a coal tract, leased at a fixed royalty, the lease to remain in the hands of the trustee under the will until the term of the lease should expire, it was held that, after the lessor's death, the trustee might sue for the arrears of royalty, whether accrued before or after the lessor's death; the executors conceding to the trustee the right of action. *Shillingford v. Good*, 95 Pa. St. 25. See § 17 *a*, *ante*.

³ *Att'y-Gen. v. Cross*, 3 Mer. 524; *Att'y-Gen. v. Brooke*, 18 Ves. 326.

⁴ *Att'y-Gen. v. Owen*, 10 Ves. 555; *Att'y-Gen. v. Hotham*, 1 Turn. & R. 209; *Att'y-Gen. v. E. I. Co.*, 11 Sim. 380.

⁵ *Att'y-Gen. v. Griffith*, 13 Ves. 575; *Att'y-Gen. v. Backhouse*, 17 *id.*

SECTION IX.

BY EXECUTORS AND ADMINISTRATORS.

§ 133. **Respective Powers of.** — Executors holding the legal estate by the will of the testator may demise the premises even before probate; but administrators have [at common law] no power over or concern with the realty of the intestate except under an order made by the court which appointed them.¹ But both executors and administrators have an

290; *Att'y-Gen. v. Warren*, 2 Swanst. 304; *Att'y-Gen. v. Foord*, 6 Beav. 288.

¹ *Bank v. Dudley*, 2 Pet. 492; *Roe v. Summerset*, 2 W. Bl. 692; 1 Atk. 461. In Indiana an administrator may let, pending administration, but his lease determines therewith. *Burbank v. Dyer*, 52 Ind. 392. So in Minnesota, G. S. 1866, c. 52, § 6; *Smith v. Park*, 31 Minn. 70. In Mississippi, Code, 1880, § 1327, the administrator may collect the rent of land leased by the intestate for the year in which his death occurs. *Tucker v. Whitehead*, 58 Miss. 762. In Michigan, How. Stat. § 5875 gives to executors the right to lease the real estate of the testator from year to year, subject to the contingency of its being turned over to the heirs or devisees on their making it appear that there are no debts or liabilities outstanding and unpaid, or that the personal estate is sufficient for the payment of all liabilities. *Grady v. Warrell*, 105 Mich. 311. While engaged in the administration, the executors are the successors in estate of the landlord, for the purpose of giving the notice authorized by § 1161, code of civil procedure (Cal.), and enforcing against the tenant who is guilty of an unlawful detainer the remedies authorized by that code. *Knowles v. Murphy*, 107 Cal. 107. But in Pennsylvania an executor cannot distrain on a lease made by the heirs, although he has made a subsequent agreement with an assignee of the lessee reducing the rent. *Grier v. McAlarney*, 148 Pa. 587. A notice to quit signed by one joint executor is sufficient. *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468. In Missouri an executor may make leases for not exceeding three years. Stat. of 1843. In Alabama the administrator or executor may take rents accruing after the lessor's death, and may rent or sell lands for the purpose of paying the lessor's debts. 1 Brick. Dig. p. 937, §§ 330-333; *Palmer v. Steiner*, 68 Ala. 400. See *Houston v. Farris*, 71 *id.* 570; *Farris v. McCurdy*, 74 *id.* 162. And the administrator may repair in order to make the premises tenantable. *Vandegrift v. Abbott*, 75 *id.* 487. If the heirs assent, an administrator may, as such, control the renting of the real estate. *Stearns v. Stearns*, 1 Pick. 157; *Choate v. Arrington*, 116

absolute power over terms of years granted to the testator or intestate and may either assign or underlet them, the rent being assets in their hands.¹ Several executors are regarded as an individual person, and have a joint and several interest in the testator's property; the lease of one executor is therefore as valid as their joint demise would be, although it purports to be in the name of all.² The husband of an executrix had, at common law, a joint interest with her in all the effects of the deceased, and might assume the whole administration and act in it, for all purposes, without her consent; but the wife could not act as executrix or administratrix without her husband's concurrence. She was therefore, with respect to terms for years which she possessed in her representative character, in no better situation during the marriage than in respect to terms for years to which she was entitled in her own right.³

§ 134. **Leases by, when void in Equity. — Legatee to be joined.** — It is also said that leases by executors or administrators, though good at law, are voidable in equity, unless shown by the lessees to be in the course of a due administration of the assets of the testator or intestate. Thus an underlease granted by an administratrix was consequently set aside, where the lessee had notice that a division of the property had been agreed upon, and that a lease was not required by the parties who were beneficially interested.⁴ A person taking from an executor a lease of premises specifically bequeathed to another, should therefore, if possible, obtain the concurrence of the legatee; for, after the executor's assent

Mass. 552. He may renew a lease in accordance with the covenant of renewal although the renewed term extend beyond his own continuance in office. *Dahm v. Barlow*, 93 Ala. 120.

¹ See § 14 *a*, *ante*. And rent on such lease goes to the executor or administrator, and not to intestate's representative. *Drew v. Bayly*, 2 Lev. 100.

² *Simpson v. Gutteridge*, 1 Madd. 616; *Bedell v. Constable*, Vaugh. 179; *Roe v. Hodgson*, 2 Wils. 129; *Beaufort v. Berty*, 1 P. Wms. 702; *Doe v. Sturges*, 7 Taunt. 217.

³ *Chamb. Leases*, 35.

⁴ *Drohan v. Drohan*, 1 Ball & B. 185; *Evans v. Jackson*, 8 Sim. 217.

to the bequest, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser.¹

SECTION X.

BY GUARDIANS.

§ 135. **Powers to Lease; at Common Law and Statutory.** — Guardians of infants, who were in the nature of guardians in socage, might, at common law, demise the infant's lands for a term of years not extending beyond the infant's age of fourteen years.² And such demises might be in the guardian's own name, and without leave of the court; for he had not merely a bare authority, but an interest in the land descended.³ But a term extending beyond that period was avoidable, provided the infant was then entitled to choose his guardian; and it might be avoided or affirmed by a subsequent guardian chosen by the infant.⁴ The common-law distinctions as to guardians have, in this country, been essentially superseded; and guardians appointed by the courts of chancery or probate, as well as testamentary guardians, are now vested with all the rights of a guardian in socage, during the infant's minority.⁵ It is generally understood that the guardian's authority continues until the majority of his ward, and is not controlled by the election of the infant when he arrives at the age of fourteen.⁶ [It is held that the father, as natural guardian of

¹ *Paramour v. Yardley*, Plowd. 539; *Westwick v. Wyer*, 4 Co. 28, b; *Doe v. Guy*, 3 East, 120. So *Fenton v. Clegg*, 9 Exch. 680.

² *Doe v. Hodgson*, 2 Wils. 129; *Bacon v. Taylor*, Kirby, 368; *Thacker v. Henderson*, 63 Barb. 271.

³ *Thacker v. Henderson*, *supra*.

⁴ *Shopland v. Ryoler*, Cro. Jac. 55-98; *Jones v. Brewer*, 1 Pick. 314; *Snook v. Sutton*, 5 Halst. 133; *Van Loren v. Everitt*, 2 South, 460; *Emerson v. Spicer*, 46 N. Y. 594.

⁵ *Byrne v. Van Hoesen*, 5 Johns. 66; *Field v. Scheffelin*, 7 Johns. Ch. 154. They, accordingly, not merely may but must lease the ward's land, and are accountable for losses from omitting so to do. *Hughes Minors' App.*, 53 Pa. St. 500; *Campan v. Shaw*, 15 Mich. 226.

⁶ *Matter of Nicoll*, 1 Johns. Ch. 25; *Matter of Dyer*, 5 Paige, 534; *Putnam v. Ritchie*, 6 *id.* 390, § 135. The courts may appoint guardians

an infant, has no authority to make a lease of the infant's land.¹ In California a lease for a longer period than the infancy of the ward is void.² A general guardian may collect and sue for his ward's share of rent collected from premises owned in part by his ward.³ Where the guardian is bound to lease property owned by his ward subject to dower, it is held that he may lease the widow's interest together with that of the ward.⁴ A lease being made by the guardian of a minor, it seems that the latter may collect the rents falling due on the lease after his coming of age.⁵ In Massachusetts a guardian has no interest in the ward's property, but a naked power only ; but he may make a lease in his own name of the ward's property, mutually binding on himself and the lessee.⁶ In New York it is held that a guardian has an interest and not merely a power, so that he cannot lease to himself.⁷ Neither the ward nor his estate can be bound by a covenant for quiet enjoyment contained in a lease of his lands, but the guardian executing such lease binds himself personally.⁸

SECTION XI.

BY COMMITTEES OF INSANE PERSONS AND RECEIVERS.

§ 136. **Powers of Committees, how derived.** — The committees of lunatics were at first considered as bailiffs, and having no permanent interest in the estate could not make leases of the lunatic's lands without an express order of the

for infants to execute leases in their behalf. See *Gomez v. Gomez*, 147 N. Y. 195.

¹ *May v. Calder*, 2 Mass. 55; *Anderson v. Darby*, 1 N. & McC. 369; *McGruder v. Peter*, 4 Gill & J. 323.

² *Ross v. Gill*, 4 Cal. 250.

³ *Coakley v. Mahar*, 35 Hun, 157.

⁴ *Neel's Appeal*, 3 Penny. (Pa.) 66.

⁵ *People v. Ingersol*, 20 Hun, 316.

⁶ *Hicks v. Chapman*, 10 Allen, 463; *Mansur v. Pratt*, 101 Mass. 60.

⁷ *Cayley v. O'Neill*, 1 Lans. 214.

⁸ *Foster v. Young*, 35 Iowa, 27; *Whiting v. Dewey*, 15 Pick. 428; *Heard v. Hall*, 16 Pick. 457; *Chestnut v. Tyson*, 105 Ala. 149.

court appointing them.¹ And the court could not enable them to grant an absolute interest, or one that the lunatic, on his recovery, might not terminate.² But the statutes of England, as well as of the several States, now authorize such committees [or guardians] to make specific leases, independent, in point of duration, of the lunatic's restoration to sanity.

[§ 136 *a*. **Receivers. — Act as Officers of the Court, merely. — Powers of.** — It is customary for the courts to appoint receivers for the protection, care, and management of the estates of suitors or for other purposes pending litigation. And in such cases the rules and orders of the courts constitute the law for the direction of such receivers, who are officers of the court which appointed them, and always act under its direction. The court may, by general or special rule or order, authorize its receiver to receive and collect all rents payable to the debtor, or to make leases from time to time as may be necessary,³ and he may obtain an order that tenants shall attorn to and pay their rent to him. But a receiver of the property of a judgment debtor, appointed in pursuance of proceedings supplementary to an execution, becomes vested with the title of the debtor by virtue of his

¹ *Foster v. Merchant*, 1 Vern. 262; *Knipe v. Palmer*, 2 Wils. 130; *Brooks v. Brooks*, 3 Ired. 389; *Pharis v. Geer*, 110 N. Y. 336. A mere bailiff cannot lease his employer's lands otherwise than at will; but a power may be conferred on him for the purpose. *Shopland v. Ryoler*, Cro. Jac. 55, 98.

² *Dikes, Ex parte*, 8 Ves. 79.

³ *Shreve v. Hankinson*, 34 N. J. Eq. 413. The court may appoint a receiver in a partition suit to lease the property, *pendente lite*, for a term certain although it extend beyond the termination of the litigation; but to extend the lease beyond a customary term would seem to be unjustifiable. *Weeks v. Weeks*, 106 N. Y. 626. See *Stanley v. National Union Bk.*, 115 N. Y. 122. A mere order of the court directing receivers to take charge of the property of an insolvent railroad company, including its leased lines, and the taking possession thereof by the receivers, does not have the effect to change either the title to the property or the right of possession in the property. The receivers thereby become the mere custodians of the property for the court. *Central Trust Co. v. Continental Trust Co.*, 58 U. S. App. 605; *Tradesman Publishing Co. v. Carwheel Co.*, 95 Tenn. 634.

appointment, and may maintain all actions incidental to a reversionary estate in the land.¹ A tenant in possession under a lease executed by a receiver appointed in an action brought against executors holding, as such, a leasehold interest in the premises, is not a tenant of such executors, so as to authorize them or their assigns to institute summary proceedings to remove him.² A receiver in equity may take and retain possession of leasehold property for such reasonable time as will enable him to elect intelligently whether the interest of his trust will be best subserved by adopting the lease and making it his own, or by returning the property to the lessor.³ Pending such election, he may enter upon and occupy the demised premises for the purpose of selling personal property thereon belonging to the trust estate without thereby accepting the lease.⁴ The receiver's election to lease may be implied from his acts; he cannot take the benefits of a contract and repudiate its obligations, and so cannot accept the benefits of a lease and settle on the basis of a *quantum meruit*.⁵ But, if he does not adopt the lease, the principles which govern the liability of an assignee of a lease are applicable to the case of a receiver of the property of the lessee; and he is legally and equitably chargeable with the payment of the rent reserved for such time as he continues to occupy the property demised.⁶ The taking and holding possession by a receiver for three months of the leased premises in which the business was conducted by the insolvent was held to bind the receiver to carry out the terms of the lease, in the absence of any order of court in the premises.⁷ Receivers accepting a lease are bound by its covenants.⁸ The receivers of a lessee

¹ *Porter v. Williams*, 9 N. Y. 142.

² *People v. McAdam*, 22 Hun, 559.

³ *Carswell v. Farmer's Loan & Trust Co.*, 43 U. S. App. 300.

⁴ *Forepaugh v. Westfall*, 57 Minn. 121; *Nelson v. Kalkhoff*, 60 *id.* 305.

⁵ *Spencer v. World's Columbian Exposition*, 163 Ill. 117; *Link Belt Machinery Co. v. Hughes*, 174 *id.* 155.

⁶ *Frank v. N. Y., L. E. & W. R. R.*, 122 N. Y. 197; *Bell v. American Protective League*, 163 Mass. 558; *Stoepel v. Union Tr. Co.*, 121 Mich. 281.

⁷ *De Wolf v. Royal Trust Co.*, 173 Ill. 435.

⁸ *Ibid.* One who agrees to take a lease from receivers is not entitled

railroad company must apply the income and revenue received from the operation of a leased railroad in accordance with the covenants of a lease so long as they operate it, and the claims of the lessor company under a lien for rent, accrued while its road was so operated, is a valid set-off against a claim for supplies and materials furnished by the receivers.^{1]}

SECTION XII.

BY AGENTS.

§ 137. **May execute Leases. — Who may be. — How authorized. —** A lease may be executed by an authorized agent, as well as by the proprietor himself. "If an agent have a letter of attorney, or other authority, he may make leases for another; but herein caution must be had of three things: 1. that the authority be good; 2. that he that is the attorney do pursue the authority strictly; 3. that he do it in the name of his principal, and not in his own name."² As to who may act as agents, there seems to be no restriction; and one may act as the agent of another, who is disqualified from acting on his own account; as an infant, a married woman, or an alien.³ His authority may be shown as well by a subsequent ratification, or an adoption of his acts by the principal, as by an original appointment.⁴ An appointment is directly to a covenant binding them to rebuild in case of accidental fire caused by his negligence. *Bodman v. Murphy*, 35 Md. 154.

¹ *Charlotte, Columbia & Augusta R. R. v. Chester & C. R. R.*, 118 N. C. 1078. A receiver adopting a lease takes it subject to any lien created thereby for rent. *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155. *Lane v. Washington Hotel Co.*, 190 Pa. 230. But no right of priority in the way of establishing such a lien for rents due is vested in a receiver merely by his appointment. *Central Appalachian Co. v. Buchanan*, 62 U. S. App. 195.

² *Shep. Touch.* 270; *Combe's Case*, 9 Co. 76. But an authority to collect a rent does not authorize the agent to lease. *Ind. M. Union v. C. C. C. & I. R. R.*, 45 Ind. 281; *Davidson v. Blumor*, 7 Daly, 285.

³ *Co. Lit.* 52, a; *Hopkins v. Mollineaux*, 4 Wend. 465; *Chastain v. Bowman*, 1 Hill (S. C.), 270; *Gove v. Buzzard*, 4 Leigh, 231.

⁴ *Townsend v. Inglis*, Holt, N. P. 278; *Haughton v. Ewbank*, 4 Camp. 88; *Brehn v. Jersey City F. Co.*, 38 N. J. 74; and the ratification relates back to the original transaction. *Lawrence v. Taylor*, 5 Hill, 113; *Frost*

proved by express words of appointment, either verbally or in writing. It may be indirectly established by proof of the relative situation of the parties, or of their habit and course of dealing and intercourse, or from the nature of the employment, as well as from subsequent ratification.¹ An agent appointed to contract for the granting of a lease need not be thereunto authorized in writing, under the Statute of Frauds; for, to constitute a valid executory agreement relating to lands by an agent, it is only necessary that the agent be lawfully authorized to make the contract.² But [by the common law] an appointment under seal is necessary where the authority extends to the execution of a lease under seal, or to the demise of any incorporeal hereditament which cannot be granted otherwise than by deed;³ and in cases where written authority

v. Deering, 21 Me. 156. Where a lease is made through an agent of the landlord solely for the purpose of securing the property until a corporation to which the lease is to be transferred be organized, and all of this is known to the agent of the landlord, the landlord cannot, after the organization of the corporation, the transfer of the lease and the possession of the property to the corporation and the payment of rent by it to the lessor for several years, hold the individual lessee liable for the rent under the lease. The principal cannot secure the benefit of the contract and repudiate the means by which its execution was induced. *Heckman's Estate*, *Ward's Appeal*, 172 Pa. 185.

¹ Story, Agency, §§ 239-260.

² *Clinan v. Cooke*, 1 Sch. & L. 22, 31; *Boylard v. Warner*, 1 Hayes & J. 79, 88; *Turnbull v. Trent*, 1 Hall. 336; *McComb v. Wright*, 4 Johns. Ch. 667; *Lawrence v. Taylor*, 5 Hill, 108; *Yerby v. Grigsby*, 9 Leigh, 387; *Lobdell v. Mason*, 71 Miss. 937; *Dahm v. Barlow*, 93 Ala. 120. An agency by parol authorizes the agent to execute a written lease without seal, in the name of his principal. *Lake v. Campbell*, 18 Ill. 109; or in his name as agent for the principal. *Duncklee v. Webber*, 151 Mass. 408. See *Cheseborough v. Pingree*, 72 Mich. 438; *Lehman v. Nolting*, 56 Mo. App. 549.

³ *Blood v. Goodrich*, 9 Wend. 68; *Horsley v. Rush*, cited 7 T. R. 209; *White v. Cuyler*, 6 *id.* 176; *Cooper v. Rankin*, 5 Binn. 613; *Plummer v. Russell*, 2 Bibb, 174; *Banorgee v. Hovey*, 5 Mass. 40; *McWhorter v. McMahan*, 10 Paige, 386. Under the English Statute of Frauds, it is settled that to make a valid executory contract for the sale of lands or an interest therein, it is not necessary that the authority of the agent should be in writing, but only that the agreement itself should be in writing, and signed by him as such agent. *Clinan v. Cooke*, 1 Sch. & L. 29. See *Champlin v. Parish*, 11 Paige, 405.

to the agent may not be sufficient to give validity to the deed in a court of law, for want of a seal, equity will compel the principal to ratify and confirm the deed.¹ [In Massachusetts, at least, the law is settled that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol.²] And if the deed is executed in the presence of the principal, and at his request, no other authority to the agent is necessary.³ A power of attorney does not admit of delegation to another, unless it contains a power of substitution; for *potestas delegata non potest delegari*.⁴ And whenever it is necessary to record a lease, the power must be recorded also.⁵

§ 138. **Agreement for Lease by, binds Principal. — Acts beyond Authority.** — An agreement for a lease by one having authority, as well as a lease executed in pursuance thereof, will bind the principal; and if the person, at the time of entering into such an agreement, is acting as the agent of another in negotiating a lease, it is not material whether, at the moment, he intends the agreement to be for his benefit or for the benefit of his principal; because, in either case, the principal will be entitled, as against him, to the benefit of the contract.⁶ And although the authority of an agent must be strictly pursued, yet his acts have been sustained when he has exceeded his authority;⁷ as if, having power to lease for ten

¹ *Harrison v. Jackson*, 7 T. R. 207; Story, Agency, § 49. An agent cannot bind his principal by deed unless he has authority by deed so to do. *Hanford v. McNair*, 9 Wend. 54.

² *Holbrook v. Chamberlain*, 116 Mass. 61.

³ *Gardner v. Gardner*, 5 Cush. 483; *Wood v. Goodridge*, 6 Cush. 120.

⁴ *Combe's Case*, 9 Co. 75, b.

⁵ *Stewart v. Hall*, 3 B. Mon. 220.

⁶ *Taylor v. Salmon*, 4 Myl. & C. 134; *Lees v. Nuttall*, 1 Russ. & M. 53; s. c. 2 Myl. & K. 819. Where a tenant for years, upon the expiration of his term, applied to the attorney who had executed the lease for a renewal, who disclaimed authority, but said that the tenant might keep possession until he heard from the landlord; he was held to become a tenant at sufferance. *Jackson v. Parkhurst*, 5 Johns. 128.

⁷ *Batty v. Caswell*, 2 Johns. 48; *Fenn v. Harrison*, 3 T. R. 757; *Munn v. Comm. Co.*, 15 Johns. 44; *Pickering v. Busk*, 15 East, 38; *Gordon v. Buchanan*, 5 Yerg. 71. In general, an authority must be strictly pur-

years, he makes a lease for twenty, it is good for the ten years, because, so far, it is a good execution of the power and will be supported in equity ;¹ although at law, according to some of the earlier decisions, it would seem not to be good *pro tanto* even for the ten years.² But an acquiescence of the principal, after knowledge of the act done for him by another, will generally be considered sufficient evidence of a ratification.³ [The power of an agent to collect and receive rents falling due to his principal, ceases upon the death of the latter, unless the agency is coupled with an interest ; and payment made thereafter to the agent does not bind the estate of the principal, although made in ignorance of such death.⁴]

§ 139. **Act under Power to be in Name of Principal.** — Generally, an act done under a power of attorney must be done in the name of the person who gives the power and not in the attorney's name ; and if it appears from the deed that the seal is in fact the seal of the agent and not of the principal, the latter cannot be made liable upon any covenant contained in it, nor will the instrument pass any estate or interest of the principal. Thus, where a deed purporting to have been made between A., by B., his attorney, of the one part, and C., of the other, is sued in order to bind the principal ; but, whatever may be the form, it will bind the principal if such be the obvious intention of the parties. The authority must be strictly followed in matters of substance ; but the whole instrument will be considered, in order to ascertain the intent of the parties and the extent of the authority. *Long v. Colburn*, 11 Mass. 97 ; *Townsend v. Hubbard*, 4 Hill, 357.

¹ *Sugd. Pow.* 545 ; *Perry v. Bowen*, Nels. 87 ; *Alexander v. Alexander*, 2 Ves. 644 ; *Campbell v. Leach*, Ambl. 740. A lease of land given during the absence of the owner from the country, by an agent having authority only to take charge of the land while he was gone, and make it pay as best he could, is terminable by the owner on his return. *Antoni v. Belknap*, 103 Mass. 193.

² *Roe v. Prideaux*, 10 East, 158.

³ *Amory v. Hamilton*, 17 Mass. 103 ; *Kingman v. Pierce*, *id.* 247 ; *Duncklee v. Webber*, 151 Mass. 408 ; *Wilks v. Back*, 2 East, 142 ; *Bogart v. Debussy*, 6 Johns. 94 ; *Hyatt v. Clark*, 118 N. Y. 567 ; *Fowler v. Shearer*, 7 Mass. 19 ; *Hopkins v. Mehaffy*, 11 S. & R. 126 ; *Harper v. Hampton*, 1 Har. & J. 622 ; *McClain v. Doe*, 5 Ind. 237 ; *Marshall v. Rugg*, 6 Wyo. 270.

⁴ *Farmer's Loan & Trust Co. v. Wilson*, 139 N. Y. 284.

the other part, stated in the attestation clause that B., as the attorney of A., had set his hand and seal thereto, it was held not to bind A., for that the addition of the word "attorney" was merely descriptive.¹ [Where a lease was in the name of the agent, it was held that the addition of the word "agent" to the signature did not make the instrument the lease of his principal.² So an action for use and occupation will not lie against the principal when there is an outstanding lease in the name of the agent.³ But a parol letting by the agent of an undisclosed principal makes the party put into possession by the agent the tenant of the owner.⁴] But if the execution of a deed appears really to be in the name and on account of the principal, the form of words used in the execution of it is not material; thus it has been held sufficient, where opposite the seal was written, "for S. B. (the principal), by C. D. (the attorney)." ⁵

§ 140. **Lease must appear to be by the Principal.** — A distinction must be observed between a bare act, as the execution of a deed, and the making of a contract; in which latter case the phraseology is held to be material; for if one describes himself in the beginning of an agreement to grant a lease as making it on behalf of another and as his agent, but in a subsequent part of the same agreement says that *he* will execute the lease, the agent becomes personally liable for its performance;⁶ while a lease made by an attorney in his own name, even if he describes himself to be the agent or attorney of his

¹ *Townsend v. Hubbard*, 4 Hill, 351; *Berkeley v. Hardy*, 5 B. & C. 355; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Elwell v. Shaw*, 16 Mass. 42; *Dean v. Roesler*, 1 Hilt. 420; *Samuel v. Scott*, 13 Phila. 64.

² *Seyfert v. Bean*, 83 Pa. St. 450; *Schaeffer v. Henkel*, 57 How. Pr. 97.

³ *Kiersted v. Orange & Alex. R. R.*, 55 How. Pr. 51.

⁴ *Charter Oak Life Ins. Co. v. Cummings*, 13 Mo. App. 76.

⁵ *Wilks v. Back*, 2 East, 142; *Spencer v. Field*, 10 Wend. 87; *Mussey v. Scott*, 7 Cush. 215.

⁶ In a lease of a theatre, the lessee was described as "M. G., representing Messrs. C. A. C. & Co., manager of the opera company," and the lease was signed by "M. G., representing C. A. C. & Co." One clause was "The said M. G. agrees to pay," etc. It was held that M. G. was liable as principal, and that the words added to his name were descriptive merely. *Gran v. McVicker*, 8 Biss. 13.

principal, together with the covenants to pay rent, are void.¹ But the attorney is not bound, even though he had no authority to execute the deed, if it appears substantially on the face of the instrument to be the deed of the principal.² Whenever, therefore, an interest is intended to pass by an instrument of lease, it should appear to be conveyed by the principal, in whom alone the interest is vested ; for a power of attorney, as such, vests no interest in the representative, and consequently can pass none from him.

§ 141. **Proper Form of Execution.**— The usual and proper form for concluding a lease executed under a power of attorney is : *In witness whereof, A. B., in pursuance of a letter of attorney hereunto annexed, bearing date, &c.* (or, if it is a general power embracing other lands, then), *in pursuance of a letter of attorney bearing date, &c., a copy of which is hereto annexed, hath set the hand and seal of the principal ;* and then to write the name of the principal and deliver it as the act and deed of the principal. When executed by an attorney for several parties, it does not seem to be necessary to affix a separate seal for each person, if the seal affixed appears to have been intended to be adopted as the seal of each of the parties.³

§ 142. **Authority to grant does not imply Authority to accept Lease.**— As a general rule, an agent cannot take a lease, for his own use, of property which he is employed to let ; for it is a rule of law that he who undertakes to act for another in any matter shall not in the same matter act for himself.⁴ This rule is similar to that applied to the case of trustees or other agents buying property which they are intrusted to sell ; for they are not allowed to derive any benefit therefrom. There-

¹ *White v. Skinner*, 13 Johns. 307; *Norton v. Herron*, 1 C. & P. 648.

² *Townsend v. Corning*, 28 Wend. 435; *Frontin v. Small*, 2 Ld. Ray. 1418; *Stone v. Wood*, 7 Cow. 453. A lease signed by the agent of the owners merely as agent, but reciting the names of the owners as his principals, and purporting to be not in his own right, may be supported. *Duncan v. Hartman*, 143 Pa. 595.

³ *McDill v. McDill*, 1 Dall. 68; *Bohannons v. Lewis*, 3 T. B. Mon. 876; *Yarborough v. Monday*, 2 Dev. 498; *Stabler v. Cowman*, 7 Gill & J. 284; *Ball v. Dunsterville*, 4 T. R. 313.

⁴ Per Ld. Thurlow, in *Whichcote v. Lawrence*, 3 Ves. 740.

fore the assignee of a bankrupt, who takes a lease of property himself instead of selling it, is held answerable for any profit or loss upon the transaction.¹ And in any case of this kind, it is incumbent on the agent to show that the transaction from which he derives a benefit is fair and reasonable; and that a full consideration has been given by him for a lease obtained from his principal.²

SECTION XIII.

BY ALIENS.

§ 143. **Right to accept Leases limited at Common Law. — Alien Enemies.** — It was a rule of the common law that an alien could not acquire title to property by mere operation of law, as by descent,³ but that he might acquire it by purchase.⁴ He might make a grant, which would be effectual against all persons except the State; but if he purchased an estate in fee, for life, or for a term of years, the king, on office found, should have it. Yet, until office found, he might enjoy it, for, until then, he was seised.⁵ Pursuant to these principles and restrictions, the common law permitted an alien friend to take a lease of a house for a year for the benefit of trade. According to Coke, however, none but an alien merchant could lease land, and then only as being necessary to trade.⁶ The English statutes also made leases of dwelling-houses or shops granted to a stranger, who was an artificer, void if they extended to a term of years; only permitting leases at will, or from year to year.⁷ But this

¹ Hughes, *Ex parte*, 6 Ves. 617. See also James, *Ex parte*, 8 Ves. 337.

² Kingsland v. Barnewall, 4 Bro. P. C. 154.

³ Jackson v. Lunn, 8 Johns. Cas. 109; Hunt v. Warnicke, Hardin, 61; Moors v. White, 6 Johns. Ch. 360.

⁴ Burk v. Brown, 2 Atk. 397; Calvin's Case, 7 Co. 25; Monroe v. Merchant, 28 N. Y. 9; McCreery v. Allander, 4 Har. & M. 409.

⁵ Co. Lit. 2, b; 1 Prest. Con. 257; Fairfax v. Hunter, 7 Cranch, 608; Orr v. Hodgson, 4 Wheat. 453.

⁶ Co. Lit. 2, b; Page's Case, 5 Co. 52, b.

⁷ Pilkington v. Peach, 2 Show. 135; Lapierre v. McIntosh, 9 Ad. & E. 857.

law, so contrary to sound policy and the spirit of commerce, has been modified in favor of aliens;¹ and Chancellor Kent questioned whether any such law existed in the United States, at least in respect to the subjects of those nations with whom we have commercial treaties.² [It is to be observed that all contracts made between subjects or citizens of countries which are at war with each other are void. If these were made in time of peace, the right to enforce them is suspended during the war, by reason of the personal disability of an alien enemy to sue or be sued. When peace is restored, this right revives, and the contract regains its original obligation, and may be enforced.³]

§ 144. **Statutory Right to accept or assign Leases.**—In New York by statute a resident alien who has filed his declaration of intent to become a citizen of the United States has a right for six years thereafter to take or assign, though not to make a lease.⁴ There are similar statutory provisions in South Carolina, Indiana, Delaware, Arkansas, Rhode Island, Georgia, Tennessee, and Texas; and perhaps elsewhere.

§ 145. **All Disabilities removed, where.**—In Louisiana, Pennsylvania, New Jersey, Maryland, Michigan, Illinois, Massachusetts, Connecticut, Iowa, Wisconsin, and Ohio, and perhaps elsewhere, the disability of aliens to take, hold, and transmit real property is entirely removed. While in Florida and Maine, aliens may, by law, “take, hold, convey, or devise” real estate. In Missouri, Mississippi, California, and New Hampshire, disabilities are removed from resident aliens, and so in Kentucky, if resident two years. In the constitutions of North Carolina and Vermont, it is provided that every person of good character who comes into the State

¹ Stat. 7 & 8 Vict. c. 66, § 5. See also *Jevens v. Harridge*, 1 Wms. Saund. 6, and notes.

² 2 Kent, Com. 62.

³ *Griswold v. Waddington*, 15 Johns. 57; 16 *id.* 438.

⁴ 1 R. S. 720, §§ 15–20. But the Laws of N. Y. of 1845, ch. 115, provide that all leases made or to be made by aliens to citizens or to resident aliens capable of holding real estate shall be valid.

and settles there, taking an oath of allegiance to the same, may thereupon purchase, and by other just means, acquire, hold, and transfer land. The disability never, of course, extended to a denizen, or foreigner who has been naturalized, who is as capable of being a party to a lease as a native-born citizen.¹

¹ 1 Bl. Com. 374; 2 Kent, Com. 70.

CHAPTER V.

THE INSTRUMENT OF DEMISE.

SECTION I.

THE FORMAL PARTS OF A LEASE.

§ 146. Deed necessary to grant Life Estate. — Particulars of. — Indentures. — We have seen that a demise for years, being but a chattel interest, may be perfected by the entry of the lessee, without deed or other instrument in writing; but a deed has always been required for the conveyance of an incorporeal hereditament, and is consequently necessary for the creation of a lease for life. And when a demise, whether for life or years, is intended to embrace the various covenants usually entered into by the parties, it must be by deed. A deed is an instrument under seal, written or printed upon paper or parchment, and takes effect by its delivery to the grantee. If it is made between more parties than one, there should be as many copies of it as there are parties; and formerly each copy was cut, or indented at the top, so that they might tally or correspond with each other. It then becomes what is technically called an indenture; the several copies of the same instrument being executed interchangeably by the respective parties. The copy delivered to the tenant is called the original lease; that retained by the landlord is the counterpart; but, for all practical purposes, both parts are originals.¹ [Where the lease and counterpart differ, the former controls.² But the words of covenant in a lease by

¹ *Dudley v. Sumner*, 5 Mass. 438; *Currie v. Donald*, 2 Wash. 58.

² *Burchell v. Clark*, 1 L. R. C. P. Div. 602.

indenture are to be taken, whatever the form of expression in the instrument, as the words of the party to whom they properly belong, or, if properly belonging to both, as the words of both; and the words, being the words of either party, are not to be taken most strongly against the one or beneficially for the other, as are the words of a deed-poll.¹ No person who is not a party to the deed can take anything by it, unless by way of remainder.²

§ 147. **Deeds-poll. — Acceptance of, implied.** — If the deed is only a single instrument, that is, signed by the grantor alone, it is not an indenture, but it is called a deed-poll. The former possesses some advantages over the latter, since it imports obligations on the part of the lessee, amounting to an agreement between two persons, — an office which the deed-poll cannot perform, since it is but a declaration by the party executing it of an act done or to be done by himself alone in favor of the other party. The lessee's acceptance of an interest under such an instrument will, however, be implied, unless he expressly dissents, and will render him liable for rent; although he cannot be made liable to an action of covenant, for he makes none, since a covenant can only be created by a deed executed by the covenantee; and consequently, by making use of a deed-poll, covenants on the part of a lessee are substantially dispensed with.³

§ 148. **Date not essential. — Takes Effect from Delivery.** — The date of a lease is not part of its substance, and need not, in fact, be inserted at all; and, therefore, a mistake in the date will not vitiate the instrument.⁴ If there is no date, or should there be an impossible date, the term will be considered as commencing from the delivery of the deed; unless some particular time for its commencement is therein specified. But if the deed has a sensible date, the word "date" in

¹ Beckwith v. Howard, 6 R. I. 1.

² Hornbeck v. Westbrook, 9 Johns. 73.

³ Thompson v. Leach, 2 Vent. 198; Chancellor v. Poole, 2 Doug. 764; Burnett v. Lynch, 5 B. & C. 589.

⁴ Jackson v. Schoonmaker, 2 Johns. 230, 234.

the body of it, will refer to that time, and not to the date of delivery.¹ And it is always competent for either party to show that the delivery took place on a day different from that of the date.²

§ 149. **Names of Parties. — Mistake in, does not invalidate. — Alter, as to Omission. —** The law knows but one Christian name, and, therefore, the omission or insertion of the middle name of either party is immaterial; for a party may show that he is as well known by one name as another.³ And neither a mistake in the spelling of an individual name nor a variance in the name of a corporation, which are not materially different from the true name, will invalidate an instrument.⁴ When the lease is made by an agent or attorney, it should run in the name of the principal and not in that of the agent; because a power of attorney gives no interest in the land, but merely authorizes the attorney to stand in the place and act in the name of his principal.⁵ And the person to whom the lease is made ought always to be made a party; for if A. covenants with B. that C. shall enter and enjoy, this will be a mere collateral covenant and not a lease; because B., with whom it is made, is a stranger, and C., the intended lessee, is no party to the agreement.⁶ [Parol evidence is inadmissible to show that a lease executed in the name of and rendering rent to one person was intended for the benefit

¹ *Church v. Gilman*, 15 Wend. 656; *Styles v. Wardle*, 4 B. & C. 908. An agreement for the lease and occupation of land made on the Lord's day being void by statute in Massachusetts, it was held that if the land was subsequently entered upon and occupied, the tenant was liable for the rent. *Stebbins v. Peck*, 8 Gray, 553.

² *Steele v. Mart*, 4 B. & C. 272; *Morris v. Wadsworth*, 17 Wend. 103.

³ *Games v. Stiles*, 14 Pet. 322; *Lyon v. Kain*, 36 Ill. 362.

⁴ *McCarthy v. Noble*, 5 N. Y. 380; *People v. Runkel*, 9 Johns. 147. "The Marmet Mining Company," the lessor named in a lease, was held, on the evidence, to be identical with the "Marmet Company," in which name an action of ejectment under the lease had been brought. *Hackett v. Marmet Company*, 8 U. S. App. 150.

⁵ *Frontin v. Small*, 2 Ld. Ray. 1418; *Wilks v. Back*, 2 East, 142; *Seyfert v. Bean*, 88 Pa. St. 450; § 137, *ante*.

⁶ *Porry v. Allen*, Cro. El. 173; 1 Leon. 136; *Havergil v. Hare*, 3 Bulst. 251.

of another;¹ or that, although made on its face to A., it was for the benefit of A. and B. jointly.²] The entire omission of a lessee's name from the instrument renders it invalid; for a deed without a grantee's name, and which has been left blank to insert the name at some future time, after delivery, is absolutely void.³

§ 150. **Recitals. — Errors in, immaterial. — Exceptions. —** Recitals of former instruments or of circumstances that have led to the making of a lease are sometimes inserted by way of explanation, or for the purpose of showing the intention of the parties. An error in a recital is not material, unless it be in the recital of a lease after the expiration of which the new term is intended to commence;⁴ or unless the recital shows that the lessor had no interest in the subject-matter of the demise.⁵ So a recital in a lease that a former lease of the premises granted to a third person had been surrendered will not be evidence of a surrender if the fact is otherwise.⁶ Nor will the execution of the counterpart of a new lease taken by the lessee prior to the determination of

¹ Jackson v. Foster, 12 Johns. 488.

² Otis v. Sill, 8 Barb. 102, 122.

³ Jackson v. Titus, 2 Johns. 430; U. S. v. Nelson, 2 Brock. 64; Hayden v. Wescott, 11 Conn. 129; Ayres v. Harness, 1 Ham. 368; Edelin v. Sanders, 8 Md. 118; Ingram v. Little, 14 Ga. 173; Hibblewhite v. Mo-Morine, 6 M. & W. 200; Davidson v. Cooper, 11 id. 794; Chauncey v. Arnold, 24 N. Y. 330; Burns v. Lynde, 6 Allen, 305; Basford v. Pearson, 9 id. 387; Simms v. Hervey, 19 Iowa, 290; Drury v. Foster, 2 Wall. 24. The cases also deny that parol authority to fill up blanks before delivery is good, though expressions *contra* are found in Chauncey v. Arnold, and Drury v. Foster, *supra*; but these cases, like *Inhabs. v. Huntress*, 53 Me. 90, relate to alterations not material, or instruments other than conveyances.

⁴ Jackson v. Streeter, 5 Cow. 529; Bath and Montague's Case, 3 Ch. Cas. 101; Shep. Touch. 77. One reason for inserting recitals is to prevent the parties from afterwards denying the matters recited; for a lease by deed operates like any other deed as an estoppel, and prevents the parties from afterwards disputing facts recited in it. But see an important qualification of this rule. 1 Greenleaf, Ev. 267.

⁵ Hermitage v. Tompkins, 1 Ld. Ray. 729; McAreavy v. Hannan, 13 Ir. C. L. 70.

⁶ Lyon v. Reed, 13 M. & W. 285.

his former interest, with a recital that it was granted in consideration of the surrender of the former lease, work a surrender, unless by operation of law; inasmuch as it does not purport of itself to be a surrender, not having words which could amount to a yielding or rendering-up of the lessee's interest.¹

§ 151. **Misrecitals, how controlled.**— If a lease for years be granted subject to another lease, to commence after the expiration of such lease, which is recited to have been made to a third person, when in fact there never was such a lease, or it had expired, or was originally void; then the new demise will take effect immediately on the execution of the deed.² So if a lease for years be granted, to commence after the termination of a former lease, existing but misrecited in a material part, the new term will commence immediately in enumeration of years, though not in possession until the end of the former lease. But if the misrecital is of an immaterial part, the term will commence at the end of the existing lease.³ A misrecital of the lessee's name has been deemed material when it was calculated to mislead; but misrecitals of the rent, of the time or place of payment, of the covenants, or that the lease was without impeachment of waste, will not be deemed material.⁴

§ 152. **Consideration to appear.**— Rent, as such, is not essential to a lease,⁵ for from favor or for a valuable consideration paid in gross, the tenant may have a lease without any render. But some consideration, express or implied, must appear to give validity to the lease as a contract; and this is either a good consideration, as natural affection; or valuable, as money or the rent reserved.⁶ The reservation

¹ *Roe v. Archbishop of York*, 6 East, 86.

² *Foot v. Berkley*, 1 Vent. 83; *Bishop of Bath's Case*, 6 Co. 84, b; 86, a.

³ *Miller v. Manwaring*, Cro. Car. 397.

⁴ *Foot v. Berkley*, *supra*.

⁵ See § 14, *ante*.

⁶ *Failing v. Schenck*, 8 Hill, 844; *State v. Page*, 1 Spears, 408; *McFarlane v. Williams*, 107 Ill. 83. A written instrument in the form of a receipt for money paid, executed by the owner in fee, giving to the person

may be not only in money but in grain, animals, or produce; or it may consist of the personal services of the lessee. It is not, however, absolutely necessary that the exact amount of the reservation be fixed at the time of the creation of the tenancy, for this may be determined afterwards.¹ And if the amount of rent has not been agreed upon, the tenant will be bound to pay as much as the use and occupation of the premises are reasonably worth.²

§ 153. **As between Lessor and Lessee, Fraudulent or Immoral Consideration avoids Lease.** — If the consideration for a lease is fraudulent, unjust, or immoral, as, for instance, if it is founded on a marriage-broking transaction, or is contemporaneous with a loan of money and intended as a means of evading the usury laws [where these make usurious contracts void], the lease will be void; although, in the latter case, the proposal for connecting the loan with the lease may proceed from the lessor.³ But an under-lessee, not concerned in the loan, or cognizant thereof, will not be disturbed by such a consideration.⁴ Nor will a lease be set aside, merely on the ground of its being contemporaneous with an advance of money to the lessor, unless there be, in addition, some evidence or legal presumption that the advance was made as a means of covering usury.⁵ As a general rule, however, a lease granted in consideration of a loan, will not, on principles of public policy, be allowed to stand; and especially, if any advantage has been taken by the lessee of the distresses of the lessor, it will be considered a mere evasion of the statute against usury.⁶ Still, the taint of usury may be named therein the exclusive right to all sand and gravel on certain described premises for one year, and excluding all other parties from the premises, was held to amount to a lease, and not a mere license. *Heywood v. Fulmer*, 158 Ind. 658.

¹ *Denn v. Cartright*, 4 East, 29.

² *Scranton v. Booth*, 29 Barb. 171; *Newell v. Lanford*, 13 Iowa, 191.

³ *Brown v. O'Dea*, 1 Sch. & L. 115; *Drew v. Power*, *id.* 182; *Molloy v. Irwin*, *id.* 310; *Doe v. Gooch*, 3 B. & A. 664.

⁴ *Molloy v. Irwin*, *supra*.

⁵ *Moore v. McKay*, Beat. 282; *Von Hollen v. Knowles*, 12 M. & W. 602.

⁶ *Morony v. O'Dea*, 1 Ball & B. 116; *Corbet v. Segrave*, 2 *id.* 101; *Brown v. O'Dea*, 1 Sch. & L. 119; *Drew v. Power*, *id.* 190.

only matter of inference; and, if it can be shown that no advantage has been taken by the lessee, but on the contrary that the circumstances are such as to render it unconscionable for the lessor to seek to set aside the transaction, and that it would be a manifest hardship to the lessee to do so, equity will not interfere.¹ [It is to be observed that the common-law doctrine of usury as stated above has but a limited application in the United States. In a few States, usury avoids the contract; in others, usurious transactions are made penal; and in some of the States the law does not attempt to regulate the rate of interest.]

§ 154. **Reservation of Rent, how expressed.**—No particular or technical form of words is necessary to constitute a reservation of rent. A demise, “provided” the lessee pays a certain rent, or in consideration of the rent aforementioned, will be as effectual as if it contained the words yielding and paying, which are the words generally made use of for this purpose.² And, as to the person in whose favor it is to be reserved, it is sufficient that the reservation be made in general terms, without saying to whom; for, in that case, the law directs the intent according to the nature of the lessor’s interest.³ As if a lessee for years makes an under-lease reserving rent to him and his heirs during the term, it would, nevertheless, accrue to his executors; for it is but a chattel interest, and not the freehold, which alone passes to an heir.⁴ Being an incident to the reversion, it must follow the nature of the land out of which it is reserved; as if a man seised as heir-at-law on the part of his mother, should demise land rendering rent to him and his heirs, it must go to the heirs on the part of the mother.⁵ And where a husband is possessed of a term of years, in right of his wife, and demises land, rendering rent,

¹ O’Brien v. Grierson, 2 Ball. & B. 382; Molloy v. Irwin, *supra*.

² Drake v. Munday, Cro. Car. 207; Caswell v. Districh, 15 Wend. 379.

³ Jaques v. Gould, 4 Cush. 384.

⁴ Knolles’s Case, Dyer, 5, b; 45, a; Co. Lit. 47, a.

⁵ Van Wicklen v. Paulson, 14 Barb. 654; Cother v. Merrick, Hard. 94. But an annual rent may be reserved by deed upon a grant in fee, and will be valid as a rent-charge; notwithstanding there is no reversion in the person entitled to it. Van Rensselaer v. Hays, 19 N. Y. 68.

the rent after his death goes to his executors, and not to the widow.¹

§ 155. **Reservation to follow the Inheritance.** — [Since rent, as such, can be reserved in favor only of one having a legal estate in the land²], if a special reservation is made, care must be taken that it be made to him from whom the estate in the land is derived.³ Thus, if a lessor reserves rent to himself and his wife, although this is good for his life, yet after his death, the wife, being a stranger, cannot have the rent;⁴ for the same reason, if it be reserved, not to the lessor but to his heir, it will be bad.⁵ But although rent, as such, cannot be reserved to a stranger, for the want of a privity of estate, such a reservation has been held good as a sum in gross, for which an action in covenant will lie⁶ [but it is held that one not privy to the consideration nor a party to the deed cannot sue thereon⁷]. And if a man seised of a freehold makes a lease for a term of years, to commence after his death, rendering rent to his heirs, this reservation will be good.⁸

§ 156. **Misdescription of Reversioner immaterial.** — A special reservation was anciently construed strictly according to the words employed, and if it ran, in the disjunctive, to the lessor or his heirs, it terminated with the lessor's death; and if to the lessor, his executors administrators, and assigns, during the term, he having a freehold, his heirs could not recover because not mentioned, nor his personal representatives,

¹ Co. Lit. 46, b; Loftus's Case, Cro. El. 279.

² Gilbertson v. Richards, 4 H. & N. 276.

³ Co. Lit. 47, a; Hornbeck v. Westbrook, 9 Johns. 73; Ege v. Ege, 5 Watts, 138.

⁴ 2 Rol. Abr. 447, l. 38.

⁵ 8 Co. 70; Co. Lit. 99, b; 213, b.

⁶ Frontin v. Small, 2 Ld. Ray. 1418.

⁷ Mellen v. Whipple, 1 Gray, 317. In Brewer v. Dyer, 7 Cush. 337, one whom the lessee had let into possession on a written agreement to pay the lessor rent, was held liable to the lessor on privity of consideration, though not a party to the contract. But this case is doubted. St. L. Exch. Bank v. Rice, 107 Mass. 41, 43.

⁸ Oates v. Frithe, 2 Rol. Abr. 447; Co. Lit. 99, b; 213, b.

because the rent was annexed to a freehold reversion.¹ But the rule was held otherwise, where the covenant was to pay rent during the term; and the doctrine was overruled,² upon the well-established principle that rent, reserved to be paid during the term, follows the nature of the reversion and goes to the person entitled to the reversion, although misdescribed, and that the misdescription may be rejected as surplusage.³ Thus if the lessor was seised in fee only his heirs could recover rent, although reserved to the lessor, his executors, administrators, and assigns, during the term; while, on the other hand, if the lessor had but a chattel interest, only his personal representatives could recover rent, although reserved or covenanted to be paid to him and his heirs.⁴ If, however, it does not clearly appear whether the lessor's interest is chattel or freehold, the words of the reservation or covenant will govern.⁵ In like manner, where a life-tenant, with remainders over, by a conveyance operative under the Statute of Uses, had power to lease and reserve rent to himself and his heirs, it was held that the remainderman could recover thereon, because the reservation must follow the inheritance.⁶

§ 157. **Exceptions, when void for Repugnancy.**— Exceptions are introduced to restrain, explain, or qualify general terms in a demise; as to except a farm out of the demise of a

¹ Co. Lit. 214, b; *Richmond v. Butcher*, Cro. El. 217.

² *Mallory's Case*, 5 Co. 112; s. c. Cro. El. 832; *Sury v. Brown*, Latch, 99; *Sacheverell v. Frogate*, 1 Vent. 161.

³ *Sacheverell v. Frogate*, *supra*, a leading case, in which it was admitted that if the reservation were to lessor merely, without more, the rent would cease on his death, *Wootton v. Edwin*, 12 Co. 86; 11 Edw. III. 86; but the contrary opinion is given by Littleton, and is apparently approved. *Sacheverell v. Frogate*, 2 Wms. Saund. 868, note. And it may be doubted, if in such a case the rent would not now be held to follow the reversion and to be recoverable by the person entitled to it.

⁴ *Whittome v. Lamb*, 12 M. & W. 813.

⁵ *Dollen v. Batt*, 4 C. B. n. s. 760. Here the interest was held chattel, because the reservation was to the lessor, his administrators and assigns.

⁶ *Whitlock's Case*, 8 Co. 69; *Isherwood v. Oldknow*, 3 Maule & S. 882; *Greenaway v. Hart*, 14 C. B. 340. But if the power is not followed, the reservation is void. *Yellowly v. Gower*, 11 Exch. 274.

manor, a close out of a farm, or the like. But an exception of that which is expressly granted is void for repugnancy; as, if one demise a house and shops, excepting the shops; or lands and underwoods thereunto belonging, excepting the underwoods; or twenty acres, excepting ten acres.¹ So an exception of a thing to which the grantor has no right is void; and therefore a lessee for years or for life, not being lessee without impeachment of waste, cannot, on assigning his term, except to himself the timber-trees, the gravel or clay, or the benefit of the coal-mines in the land.² But a lessee without impeachment of waste may make such an exception. So if he grant a less estate than his own; as, if lessee for years underlet for a shorter term, or lessee for life make a lease for years, in either case, the wood, underwood, and trees growing upon the land, may properly be excepted; for the mesne lessor remaining tenant, and continuing liable to his lessor, may thus secure to himself a remedy against the sublessee, in the event of his cutting down trees, or the like.³ If a lessor intends to retain a right of way, or any other right over the demised property, he must expressly reserve it. But a covenant by the lessee, to pull down the corner of the house leased to him, for the purpose of letting the lessor make a cart-way over the spot, will not confer such a right.⁴ And the reservation of a right of way on foot and for cattle and sheep does not give a right of way to carry manure, which implies drawing it in a carriage.⁵

§ 158. **Reservations, distinguished from Exceptions.** — A reservation is properly of some right or profit, to arise from the subject of the demise, which previously had no separate existence; while an exception relates to some existing component part of the thing demised, capable of being severed or distinguished from it. As, in the case of a demise of all

¹ *Stukeley v. Butler*, Hob. 170; 3 Dy. 264, b, n. (40); *Kenson v. Reading*, Cro. El. 244.

² *Saunders's Case*, 5 Co. 12, a; *Sanders v. Norwood*, Cro. El. 688.

³ *Bacon v. Gyrling*, Cro. Jac. 296; *Percy's Case*, 18 Co. 60; 1 Com. Dig. 607; *Biens*, H.

⁴ *Good v. Hill*, 2 Esp. 690.

⁵ *Brunton v. Hall*, 1 Gale & D. 207.

that farm called A., except a particular close, without the exception the close would pass as part of the farm; and the words of exception are considered the words of the lessor.¹ But where there is a reservation of a thing *dehors* the lease, as a way, common, or other profit; or a proviso that it shall be lawful for the lessor, at any time during the term, to cut and carry away the trees; the words amount to a reservation or to an agreement on the part of the lessee for the lessor's enjoyment of the privilege referred to, and not to an exception.² An exception includes everything dependent on it and necessary for its enjoyment; thus, if a lease reserves the wood, this includes the right to enter and carry it away.³ So, notwithstanding an exception of certain closes or rooms which the lessee is not to use, he may still pass and repass through them, if they are so situated that he cannot otherwise have the complete enjoyment of the premises demised to him.⁴ If there is a reasonable doubt as to the meaning of an exception, the words of the exception, being the words of

¹ *Bullen v. Denning*, 5 B. & C. 842. So where a lessor of a perpetual lease with the machinery reserves a "lien" on the machinery, this was held not merely a mortgage to him, but to take effect as a reservation, or more properly exception, and as valid against the lessee's creditors. *Metcalf v. Fosdick*, 23 Ohio St. 114.

² *Russell & Gulwel*, Cro. El. 657. A lessor may reserve by parol the crop growing on the land at the date of the lease. Such an agreement converts the crop, as between the parties, into personalty. *Youmans v. Caldwell*, 4 Ohio, 71. So the hay may be reserved. *Jordan v. Staples*, 57 Me. 352. So in *Heald v. Build. Ins. Co.*, 111 Mass. 38, the covenant of two lessees not to remove the hay, but to feed it out to the cattle, was called a reservation, and it was held that sole title thereto vested in the lessors as it came into existence. But these cases seem to operate rather as exceptions than reservations. *Durham Co. v. Walker*, 2 Gale & D. 326, and see *Colville v. Miles*, 127 N. Y. 159; *Briggs v. Austen*, 129 *id.* 208. The reservation of a right of way is a reservation to the grantor only. *Bridger v. Pierson*, 1 Lans. 481. Where a lease for years reserves to the lessor the right to recover for damage to the estate from any railway passing through it, the lessee cannot recover for injury caused thereby to his term of years. *Burridge v. New Alb. R. R.*, 9 Ind. 546.

³ *Foster v. Spooner*, Cro. El. 17; *Cardigan v. Armitage*, 2 B. & C. 206. But, by an exception of certain rooms, a right of foot way not of carriage way is reserved. *Fort v. Brown*, 46 Barb. 366.

⁴ *Liford's Case*, 11 Co. 52, a.

the lessor, are to be construed favorably for the lessee and against the lessor. As in a lease of lands, excepting and reserving all timber-trees and other trees, but not the annual fruit thereof, it was held that the apple-trees were not within the exception.¹ If the exception is not specified with reasonable certainty it is void altogether; as in the case of a demise of a manor excepting one acre, not specifying what acre.² A saving-out of an exception defeats the exception to the extent of the saving; and, therefore, if one let a manor for years, excepting the mansion-house, saving to the lessee a certain chamber, the chamber passes as if there had been no exception.³

§ 159. *Words of Demise.* — No particular form of words is necessary to constitute a lease; but words which express the intent of the parties that one shall divest himself of the possession of his property and the other take it for a certain time, will amount to an effectual lease.⁴ The usual words of leasing were “demise, grant, and to farm let;” but, according to Coke, the word *dedi* is sufficient to make a lease for years.⁵ And a covenant with a man to stand seised to his use will operate as a lease at common law,⁶ and so will a license to enter and enjoy land, or to reside in a certain house.⁷

¹ *Bullen v. Denning*, *supra*; *Shep. Touch.* 100; *Cardigan v. Armitage*, *supra*. But see *Barnes v. Ravensworth*, 15 C. B. 512.

² *Dorrell v. Collins*, *Cro. El.* 6. A reservation in a lease of “one day’s service, with carriage and horses” annually, on a day named, is not void for uncertainty. *Van Rensselaer v. Jones*, 5 Den. 449.

³ *Leigh v. Shaw*, *Cro. El.* 872; 3 *Dyer*, 264, b, n. (40).

⁴ *Hallett v. Wylie*, 8 *Johns.* 47; *Thornton v. Payne*, 5 *id.* 74; *Bac. Abr. tit. Lease*; *Maverick v. Lewis*, 8 *McCord*, 211; *Morrill v. Mackman*, 24 *Mich.* 279. A lease of a first loft in a building, after describing the property and giving the terms, contained this memorandum: “Tenant to have privilege of storing a reasonable number of cases in the basement.” It was held, that the clause quoted did not amount to a leasing, and that, at most, it was but a grant of privilege to the lessee to occupy, for a special purpose, space not included in the lease. *Cluett v. Sheppard*, 181 *Ill.* 686.

⁵ *Co. Lit.* 801, b. The term *grant* includes a *demise* or *lease*. *Darby v. Callaghan*, 16 *N. Y.* 71, 75.

⁶ *Right v. Thomas*, 8 *Burr.* 1446.

⁷ *Right v. Proctor*, 4 *Burr.* 2209.

And where a man, by his will, declared, "I have made a lease to J. S. for twenty-one years, he paying but twenty shillings rent," it was held that this was a lease for twenty-one years, and that the word "have" should be taken in the present tense, and as equivalent in significance to the word "grant" in a deed of feoffment, by which the party is estopped from denying the creation of an estate.¹ An agreement that A. shall have, occupy, and enjoy land will enure as a lease if it appears to be the intention of the parties to create the present relation of landlord and tenant.² But if a forfeiture would be incurred by making a lease and the intent of the parties does not clearly appear, the agreement will be construed as an agreement for a lease, and not a lease.³ And it has been held that if the owner of premises sells and transfers them by written instrument, and there is a separate agreement between him and the vendee (founded on a sufficient consideration other than the sale of the premises) that a third person shall be tenant of the vendee from year to year, this agreement, being collateral to the sale and not a condition thereof, creates such a tenancy, though it is not so provided in the instrument.⁴

§ 160. **Proper Description, what. — Uncertainty, how far explainable.** — A proper description of the subject-matter of the demise is important, since, if the instrument does not ascertain the premises with reasonable certainty, it is void.⁵

¹ 2 Bend. 7. That a recital in a will is an estoppel to all claiming under the will, see *Denn v. Cornell*, 3 Johns. Cas. 174.

² *Hallett v. Wylie*, *supra*, 1 Rol. Abr. 847, l. 40; *Whitlock v. Horton*, Cro. Jac. 92; *Evans v. Thomas*, *id.* 172; *Doe v. Ashburner*, 5 T. R. 163.

³ *Lady Montague's Case*, Cro. Jac. 301.

⁴ *Denn v. Cartright*, 4 East, 29. See *ante*, c. 1, § 1.

⁵ *Dingman v. Kelley*, 7 Ind. 717; *Bailey v. White*, 41 N. H. 337; *Kea v. Robson*, 5 Ired. Eq. 375; *Rollin v. Pickett*, 3 Hill, 552; *Patterson v. Hubbard*, 30 Ill. 201; *Reed v. Lewis*, 74 Ind. 433; § 46, *ante*. A description by metes and bounds, not specifying any township, range, county, or State is insufficient to render the lessee liable for rent when there has been no entry by him. *Bingham v. Honeyman*, 32 Or. 129. A lessee in possession under the lease will be estopped to set up the want of a sufficient description therein in defence to an action upon the covenants in the lease. *Hoyle v. Bush*, 14 Mo. App. 408. Where the terms of demise were stated

But if the description given affords means of ascertaining and identifying the leased premises, this is sufficient notwithstanding there may be errors or inconsistencies in some of the particulars.¹ It is not generally advisable to particularize too minutely all the circumstances of name, place, boundary, and occupation; for, where numerous circumstances are referred to, they tend to confusion, and questions frequently arise how far they must concur in designating the demised premises, and to what extent words of particular explanation may qualify words of general description.² But, as a general rule, applicable to all parts of the contract of lease, inaccuracies and uncertainties may be explained by evidence outside of the instrument of demise if such evidence neither varies nor contradicts the written contract.³

[§ 160 *a*. **General Rules of Construction.** — In construing written documents, it is a general rule that regard is to be had to all their parts; and that general words may be restrained by particular recitals. Thus if a lease may operate

by the landlord in the following letter, "I propose to let the premises to you *as I described them*," and stating the rent, to which letter the proposed tenant replied accepting the proposal and suggesting further terms and propositions, it was held that there was not a sufficient description of the premises to constitute a letting. *Jarboe v. Mulrey*, 49 N. Y. s. c. 525. It is held that a lease with insufficient description may be put in evidence in an action for rent accrued to prove the contract as to rent, and the damages for unlawful detainer. *Whipple v. Shewelter*, 91 Ind. 114.

¹ *Worthington v. Hylyer*, 4 Mass. 196; *Vose v. Bradstreet*, 27 Me. 156; *Bosworth v. Sturtevant*, 2 Cush. 392; *Eggleston v. Bradford*, 10 Ohio, 312; *Campbell v. Johnson*, 44 Mo. 247. If the description of property intended to be conveyed includes a number of particulars, all of which are essential to ascertain its identity, no estate will pass except such as will agree with every part of the description; but, if the tract intended to be conveyed is indicated with reasonable certainty, it will pass, although in some respects the description is erroneous. *McLoughlin v. Bishop*, 35 N. J. L. 512.

² A description of premises, though imperfect, is sufficiently certain if the boundaries can be ascertained with reasonable certainty, especially if possession has been taken. *Pierce v. Minturn*, 1 Cal. 470. Where land is leased in gross, there can be no question made that the land was less in quantity than described. *Leavitt v. Murray*, Wright, 707.

³ *Putnam v. Bond*, 100 Mass. 58.

in two ways, the one consistent with the intent of the parties, and the other repugnant to it, effect will be given to the intent,¹ and although the intent of the parties be in opposition to the strict letter of the contract, it must prevail when clearly ascertained from it.² A promise is to be interpreted in that sense in which the promisor knew that the promisee would understand it.³ Other things being equal, when two clauses are so inconsistent with or repugnant to each other that both cannot stand, the first will be enforced and the latter rejected; but it is the duty of the court to reconcile them if possible.⁴ The granting clause generally controls.⁵ Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless the omitted word be introduced, the lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.⁶ A sweeping clause, at the end of a particular specification, will not pass any property of a different nature from that particularly set forth.⁷ An instrument of demise agreed to let for a year, but most of the stipulations following were inapplicable to a tenancy determinable by a notice to quit. It appeared on its face originally to have contained words creating a tenancy from year to year, which had been stricken out, and such words were allowed to be supplied so as to show the intention of the parties to have been to lease for a year only; and it was held that the words inconsistent with such a

¹ *Quackenboss v. Lansing*, 6 Johns. 49.

² *Goodtitle v. Bailey*, Cowper, 600; *Solly v. Forbes*, 4 Moore, 448; *Hathaway v. Power*, 6 Hill, 443; *Tracy v. Albany Exchange Co.*, 7 N. Y. 474; *Marvin v. Stone*, 2 Cow. 781; *Orphan Asylum Society v. Waterbury*, 8 Daly, 35; *Browning v. Wright*, 2 B. & P. 13. It is said that a lease must be read in the light of the previous agreement out of which it arose. *Reading Iron Works*, 150 Pa. 369.

³ *Barlow v. Scott*, 24 N. Y. 40.

⁴ *Gould v. Womack*, 2 Ala. 83; *Herrick v. Hopkins*, 23 Md. 217; *Havens v. Dale*, 18 Cal. 359; *Daniel v. Veal*, 82 Ga. 589.

⁵ *Webb v. Webb*, 29 Ala. 588.

⁶ *White v. Eagan*, 1 Bay, 247; *Wight v. Dickson*, 1 Dow. 141.

⁷ *Smith v. Strong*, 14 Pick. 128; *Barnard v. Martin*, 5 N. H. 536.

tenancy must be expunged, or construed as applicable only in case the tenancy should continue beyond the year.¹ It has been held that an indefinite description in a lease might be supplied from an accurate description of the same premises contained in an assignment of the leasehold interest.² It is held that it is not necessary that a lease shall expressly declare that the rent shall be paid in advance, if it appears from the language of the instrument and the conduct of the parties that the intention was that the rent should be so payable.³

§ 161. *Incidents pass by the Grant.*— In general, the grant of a thing passes the incident as well as the principal, though the latter only is mentioned, unless there appears an express reservation.⁴ Thus, the lease of a building passes everything belonging to it or which is essential to its enjoyment; and if of a messuage or mansion, includes not only the dwelling-house, but the out-houses, barns, stables, cow-house, and dairy if they be parcel of the mansion, although they be not under the same roof, or lie contiguous to it.⁵ [So the lease of a hotel, with the furniture therein, embraces whatever goods, furniture, utensils, and other appendages are necessary or convenient for carrying on the business.⁶ A lease of a ground floor abutting on a yard also belonging to the lessor and forming part of the same tenement, carries the right to have the windows looking on the yard remain unobstructed,⁷ and a tenant having a right to light and air, as against his cotenant, the landlord's consent to the cotenant's obstruction of the same cannot justify such obstruction.⁸ It is a general rule that an easement will enure to

¹ *Strickland v. Maxwell*, 4 Tyrw. 846; *Hull v. Fuller*, 7 Vt. 100.

² *Hunt v. Campbell*, 83 Ind. 48.

³ *Ellis v. Price*, 195 Pa. 43.

⁴ *Pattison v. Hull*, 9 Cow. 747; *Rood v. N. Y. & E. R. R.*, 18 Barb. 80; *Skull v. Glennister*, 16 C. B. n. s. 81.

⁵ *Kerslake v. White*, 2 Stark. 508; *Riddle v. Littlefield*, 53 N. H. 513.

⁶ *Ball v. Goulding*, 27 Ind. 173.

⁷ *Doyle v. Lord*, 64 N. Y. 482. See *Riviere v. Bower*, Ry. & M. 24; § 317, *post*.

⁸ *Spies v. Dam*, 54 How. Pr. 293.

the owners of the several parts into which the dominant estate may be divided, so that the burden on the servient estate be not enhanced.¹ But a tenant of one room has not an exclusive right to the outer wall.² On a lease of premises together with all ways appertaining, or with any parts thereof used or enjoyed, a right of way passes, although not expressly mentioned, upon proof that it is used with the premises at the time the lease is granted.³ A garden is parcel of a house, and passes without the addition of the word appurtenances.⁴ By the grant of a piece of ground, a necessary right of way to it over the grantor's land also passes. So a grant of "trees" carries a power to enter on the land, and cut and carry them away.⁵ The word "land" passes all that grows or is built upon its surface; including buildings, trees, fixtures and fences.⁶ A "farm" includes houses and lands; while a "grange" will include not only barns, but stables and out-houses used for the purpose of husbandry.⁷ But the demise of a "house" or barn, without other words to extend its meaning, will pass no more land than is necessary for its complete enjoyment.⁸ [A lease of a "building" con-

¹ *Outerbridge v. Phillips*, 16 Abb. (N. C.) 117.

² *Pevey v. Skinner*, 116 Mass. 129.

³ *Kooystra v. Lucas*, 5 B. & A. 830.

⁴ *Bettisworth's Case*, 2 Co. 32; Plow. 171; 1 Inst. 5, b. The general principle that a lease of land carries with it the minerals upon the land, applies only where the contract relates to the land generally, without exception or reservation. *Shaw v. Wallace*, 1 Dutch. 453.

⁵ *Holmes v. Goring*, 2 Bing. 83; *Clarke v. Cogge*, Cro. Jac. 170.

⁶ *Canfield v. Foord*, 28 Barb. 336; *Green v. Armstrong*, 1 Den. 550; *Mott v. Palmer*, 1 N. Y. 564. The word "land," when used alone in Dutch deeds, means arable land only. *Van Gorden v. Jackson*, 5 Johns. 440. A conveyance of the fee of the land does not pass growing trees previously sold. *Warren v. Leland*, 2 Barb. 618.

⁷ Co. Lit. 4, a; *Burton v. Brown*, Cro. Jac. 648; *Isham v. Morgan*, 9 Conn. 874; *New York Central R. R., In re*, 50 N. Y. 414. Seventy acres, lying and being in the southwest corner of a section, is a good description, and the land will lie in a square. *Walsh v. Ringer*, 2 Ohio, 327; and see *Cockrell v. McQuinn*, 4 T. B. Mon. 63.

⁸ *Bennet v. Bittle*, 4 Rawle, 339; *Cheseborough v. Pingree*, 72 Mich. 438. A lease devising the basement and first floor of a building, and nothing more, does not give the lessee any interest in the land beyond that directly connected with the leased apartments, and such a lease is a

veys the land under the eaves, if owned by the lessor, and his erection of a wall there is an eviction.¹ A lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor.² Where machinery is used on the demised premises, and the lessor is to furnish power, a blast on lessor's premises, connected with the machinery, will be treated as part of the leased property.³ But adjoining buildings, though necessary and used with demised premises, do not pass unless particularly described.⁴] In some cases, a grant of the produce of the soil will pass the soil itself; thus "pasture" will be taken not only as the privilege of feeding on the land, but as the land itself. So the grant of "a wood" will pass the soil as well as the timber. And where the issues and profits of the land were demised for a term of years, the land itself was held to pass; for to have the issues and profits was said to be the same thing as to have the land itself.⁵

§ 162. **But not the Indirect Incidents.** — This principle, however, applies only to such things as are directly incident to the grant and necessary to the enjoyment of the thing granted; therefore an easement which does not naturally and necessarily belong to the premises will not pass.⁶ And if a man, upon a lease for years, reserves a way through the house of a lessee to a house in the rear, he can only use this at reasonable times, and upon request.⁷ A way of necessity is also limited by the necessity which created it, and when the necessity ceases the right of way ceases, so that if, at any subsequent period, the party entitled to such a way can,

letting of apartments and not of land. *Harrington v. Watson*, 11 Or. 148; *Winton v. Cornish*, 5 Ohio, 477; *Graves v. Berdan*, 26 N. Y. 498; *McMillan v. Soloman*, 42 Ala. 356; *Stockwell v. Hunter*, 11 Met. 448; *Seidel v. Bloeser*, 77 Mo. App. 173.

¹ *Sherman v. Wilkins*, 113 Mass. 481.

² *Hooper v. Farnsworth*, 128 Mass. 487.

³ *Thropp v. Field*, 11 C. E. Green, 82.

⁴ *Ogden v. Jennings*, 62 N. Y. 526.

⁵ *Parker v. Plummer*, Cro. El. 190; Co. Lit. 4, 6.

⁶ *Manning v. Smith*, 6 Conn. 289.

⁷ Per Parke, B.; *Sand v. Kingscote*, 6 M. & W. 189.

by passing over his own land, approach the place to which it led, by a course as direct as the old way, the way ceases to exist as of necessity.¹

§ 163. **Certain Description not controlled.— Construction.—** Whether certain premises are parcel of and included under those demised, does not necessarily depend upon the question of boundaries, as expressed in the lease, but rather upon the intention of the parties, which, if ambiguous, is always matter for proof.² But if the grant is in its terms certain, no evidence can be permitted to vary it. If the premises can be identified, it is sufficient, although all the particulars may not be true. Thus in a demise of certain specified meadows containing ten acres, which are afterwards found to contain twenty acres, all the meadows pass.³ But where a demise is by indenture, the parties are estopped from alleging that the condition of the premises was the same as described in the lease; as, for instance, that land described as meadow was such.⁴ So natural, visible, or artificial boundaries will prevail over specified courses and distances; since these are less certain than the former.⁵ As in the

¹ *Holmes v. Goring*, 2 Bing. 76; *Wilson v. Bagshaw*, 5 Mann. & R. 448; *Osborn v. Wise*, 7 C. & P. 761.

² *Trimble v. Ward*, 14 B. Mon. 8.

³ *Doe v. Burt*, 1 T. R. 701; *Doe v. Jersey*, 3 B. & C. 870; *Cary v. Thompson*, 1 Dale, 35.

⁴ *Birch v. Stephenson*, 3 Taunt. 469.

⁵ *Doe v. Thompson*, 5 Cow. 371; *Jackson v. Widger*, 7 *id.* 723; *Woods v. Kennedy*, 5 T. B. Mon. 174; *Mayhew v. Norton*, 17 Pick. 357; *Massengill v. Boyle*, 4 Humphrey, 205. A grant of land bounded on tidewater, extends only to ordinary high-water mark. *Wiswall v. Hall*, 3 Paige, 313; *Gould v. H. R. R. R.*, 6 N. Y. 522. If bounded by a river where the tide does not ebb and flow, the grant extends to the middle of the stream. *Comm'rs v. Kempshall*, 26 Wend. 404; *Child v. Starr*, 4 Hill, 369. If it is described as running along the shore or bank of the river, the grant is restricted to the margin at high water. *Storer v. Freeman*, 6 Mass. 435; *Hatch v. Dwight*, 17 *id.* 298; *Kingman v. Sparrow*, 12 Barb. 201; but if it be to the bank of a stream not navigable, the grant will extend to the thread of the stream, *Jackson v. Louw*, 12 Johns. 252, and the lessee will be entitled to the accretions caused by the stream's retreating or by changes in its current during the term. *Cobb v. Lavalley*, 89 Ill. 331. But see *Halsey v. McCormick*, 13 N. Y. 296.

demise of a certain tract of land on a creek, supposed to contain twenty acres more or less, then in the possession of a certain person, it was held that the lease was not limited to the twenty acres, but extended up to the creek of which the party was in possession.¹ But if the land is described by reference to known monuments, such a description must prevail, even to the exclusion of an understanding between the parties that the lands shall be bounded by certain other monuments.² Where the quantity is mentioned, in addition to a description of the boundaries of land, without any express covenant that the land contains that quantity, the whole must be taken together and considered as mere description.³ [If land is conveyed by metes and bounds, and the description at its close states the quantity of the land, such statement is matter of description merely, and not a covenant of quantity.⁴]

§ 164. **Description by Reference. — Parol Evidence. — Mistakes not fatal.** — A description may be made certain by reference to another deed.⁵ Or if the description is imperfect, and yet sufficient appears to point inquiry to the true locality and boundary of the land, the deed is not void for uncertainty, which may be cured by parol evidence.⁶ And where particu-

¹ *Hall v. Powel*, 4 S. & R. 456; *Shaw v. Clements*, 1 Call, 438; *Bustin v. Christie*, Tayl. 116; *Baker v. Seekright*, 1 Hen. & M. 177. The words *more or less* must be confined to a reasonable quantity, and it was held that they could not include so much as thirty acres. *Day v. Flynn*, Owen, 133.

² *Clark v. Bayard*, 9 N. Y. 183; *Davis v. Rainsford*, 17 Mass. 207.

³ *Powell v. Clark*, 5 Mass. 355. See *Hunt v. Campbell*, 83 Ind. 48, as cited, § 160, *ante*. Where a person lets his *farm and farming-house thereon*, the lease of the farm embraces all buildings upon the land, whether specified or not. *Hay v. Cumberland*, 25 Barb. 594.

⁴ *Roat v. Puff*, 3 Barb. 353; *Mann v. Pearson*, 2 Johns. 37; *Howe v. Bass*, 2 Mass. 380; *Powell v. Clark*, *supra*; *Jackson v. M'Connell*, 19 Wend. 175; *Belden v. Seymour*, 8 Conn. 19; *Smith v. Dodge*, 2 N. H. 303; *Call v. Barker*, 3 Fairf. 320; *Large v. Penn*, 6 S. & R. 488.

⁵ *Allen v. Bates*, 6 Pick. 460. Punctuation will be referred to, to settle the meaning of an instrument, after other means fail. *Ewing v. Burnet*, 11 Pet. 41.

⁶ *Jenkins v. Bodley*, 1 Smedes & M. Ch. 838; *Seaman v. Hogeboom*, 21

lars are set forth sufficiently certain to designate the thing intended to be demised, the addition of circumstances which are false or mistaken will not frustrate the deed; as if the words "with the dwelling-house thereon," be inserted in the description, when, in fact, there is no dwelling-house on the premises, this will be considered merely a false circumstance, which does not defeat the conveyance.¹ [And a tenant who has occupied and paid rent under a written lease, is estopped to defend against a claim for the rent on the ground that the lease is void for uncertainty in the description of the premises.²] An indorsement upon a lease, written at the time of signing and delivery, is deemed to be incorporated in it, and may, therefore, introduce any matter, whether of description or otherwise, tending to qualify the provisions

Barb. 398. The general rule is that uncertainty in the description will not render a deed void if such result can be avoided by reconciling or rejecting the necessary particulars. *Hull v. Foster*, 7 Vt. 100; *Wright v. Cochran*, 3 Iowa, 507; *Harvey v. Mitchell*, 31 N. H. 575; *Wing v. Burgis*, 12 Me. 111. An evident omission may be supplied by construction. *Hoffman v. Riehl*, 27 Mo. 554. A description in a lease is not necessarily imperfect because a surveyor may be unable to locate the premises by reference to the description alone. *Coppinger v. Armstrong*, 8 Bradw. (Ill.) 210. A name such as "Zeringue's Landing under Nine Mile Point," sufficiently describes between the parties the object leased when other contracts for the same thing have been made between them, or the name has come to designate a particular thing in the community. *Wood v. Fabrigas*, 105 La. Ann. 1. It is held that a lease of "Rose Hill," not specifying the State, county, or civil district in which the farm is situated, is valid *inter partes*, and may be good as against subsequent purchasers. *Dougherty v. Chesnutt*, 86 Tenn. 1. It is said that the mere act of delivery of possession is equivalent to an assertion by both parties that the lot is the one described in the lease, although it does not precisely coincide by metes and bounds with the description contained in the lease. *Outtoun v. Dulin*, 72 Md. 536.

¹ *Jackson v. Clark*, 7 Johns. 217; *Jackson v. Marsh*, 6 Cow. 281. A lease of a lot, describing it as number 2, but adding metes and bounds, descriptive of lot number 4, which the lessor did not own, the tenant taking possession of the former, is a good lease of number 2. *Lush v. Druse*, 4 Wend. 313. Where a mining lease provided for the lessee's mining in a lot described by metes and bounds, and after the first lot was exhausted, "in another lot adjacent," the contract as to the last lot was held not void for uncertainty. *Iron Co. v. Stevens*, 5 Lea, 468.

² *Appleton v. O'Donnell*, 173 Mass. 398.

contained in the body of the instrument or even to defeat it by way of condition.¹ Even separate instruments, executed at the same time, relating to the same subject-matter, may be construed together as different parts of the same agreement.² But a written declaration indorsed on a lease, after its execution by the lessor, that he intended to demise a greater interest than the lease expresses, is inoperative to convey any interest.³ Nor will any other indorsement made upon an instrument [required to be] under seal, after its execution, in any manner control or affect the original deed unless such indorsement be under seal also; for a deed is incapable of modification or discharge, but by an instrument of as high a nature as itself.⁴ [Generally, parol evidence is admissible to show the location and limits of land described in a written lease, but not to show that the parties at the time of making the lease agreed upon a different location or limit from that written in the lease.⁵]

§ 165. **Fraudulent Alterations, Effect of.** — The fraudulent alteration of an instrument, after its execution and delivery, by one claiming a benefit under it [if unexplained⁶], avoids it so far as respects any remedy by action upon it; and this, whether the alteration be in a material, or immaterial part.⁷ [The addition of a word which the law would supply is not an alteration,⁸ nor is a writing or erasure which does not

¹ *Flint v. Brandon*, 4 B. & P. 73; *Lyburn v. Warrington*, 1 Stark. 162; *Emerson v. Murray*, 4 N. H. 171.

² *Hills v. Millar*, 8 Paige, 254; *Linsley v. Tibbals*, 40 Conn. 522.

³ *Russell v. Scott*, 9 Cow. 279; *Goodright v. Mark*, 4 M. & S. 80; *Williams v. Handley*, 3 Bibb, 10.

⁴ *Goodright v. Mark*, *supra*. A lease was extended by an agreement indorsed upon it, varying its terms; and, subsequently, after the expiration of the original term, another extension of "the within lease" was indorsed. It was held that this extended the modified lease. *Cram v. Dresser*, 2 Sandf. 120.

⁵ *Meredith Mechanics Ass'n v. Am. Twist Drill Co.*, 66 N. H. 267.

⁶ *Williams v. Starr*, 5 Wis. 534; *Woodworth v. Bank of America*, 19 Johns. 391.

⁷ *Pigot's Case*, 11 Co. 266; *Master v. Miller*, 4 T. R. 320; *Boston v. Benson*, 12 Cush. 61; *Davis v. Coleman*, 7 Ired. 424.

⁸ *Hunt v. Adams*, 6 Mass. 519.

alter the meaning of the instrument, nor tend to mislead.^{1]} The general rule does not apply if the alteration is made by a stranger, without the consent of the party in interest.² The application of the rule does not affect the title to real estate; for neither the alteration nor destruction of a deed after delivery will divest an estate which has once become vested by a transfer of possession, although the covenants contained in such a deed may be thereby rendered void.³ Yet, where an estate cannot exist except by deed, and the deed creating the estate is fraudulently altered, or destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party and the estate which he derived under it is gone also.⁴ But as to an estate which may exist without writing, such as a term of years [at common law], a rent, or other incorporeal hereditament, a fraudulent alteration will nullify the instrument with the covenants contained in it, but not the estate; yet, as a rent-charge can only be created by deed, a fraudulent alteration of such a deed will destroy the estate.⁵ Where, however, a rent was created by indenture in counterpart, each part being executed by both parties, and one was delivered to each, and the grantee of the rent altered his deed in a material part; it was held that although a deed

¹ *Morrill v. Otis*, 12 N. H. 466; *Nichols v. Johnson*, 10 Conn. 192; unless made fraudulently: *Moye v. Herndon*, 30 Miss. 110; *Huntington v. Finch*, 3 Ohio, 445. Blanks in a sealed instrument cannot be filled after its delivery, by another, except by the authority of the grantor under seal. Co. Lit. 171; *Shep. Touch.* 54; 4 Vin. Abr. Blank.; Com. Dig. Fait. A., p. 1. But there are cases where, in the same instrument, there are disconnected obligations, or statements, independent of each other, and where the alteration or insertion of one, after the others have been executed, will not affect it. *Doe v. Bingham*, 4 B. & A. 672; *Woolley v. Constant*, 4 Johns. 54.

² *Rees v. Overbaugh*, 6 Cow. 746; *Malin v. Malin*, 1 Wend. 625; *Nichols v. Johnson*, *supra*.

³ *Woods v. Hildebrand*, 46 Mo. 284.

⁴ *Wallace v. Harmstad*, 44 Pa. St. 492; *Wright v. Kelly*, 4 Lans. 57.

⁵ *Arrison v. Harmstad*, 2 Pa. St. 191. The presumption is that a material alteration, not noted in the attestation clause, has been made since execution. The party claiming under the deed must show the contrary or otherwise explain the alteration. *Montag v. Linn*, 23 Ill. 551; *Acker v. Ledyard*, 8 Barb. 514; *Ely v. Ely*, 6 Gray, 489.

is essential to a rent as lying in grant, neither the remedy nor the estate of the grantee was gone; for, although the alteration of the grantee's deed avoided that, yet, both deeds being originals, there was a good deed in the hands of the grantor to support both the contract and the estate.¹

SECTION II.

THE EXECUTION OF A LEASE.

§ 166. **What constitutes. — Seals. —** The execution of a lease consists in its signature and delivery to the lessee, if it be a parol contract; or in its sealing and delivery, if it be by deed. The requisites of a sufficient signature to an agreement to give a lease and of the signature to the lease itself are similar.² When a seal is required, it must, according to the strict common-law form, be an impression upon wax, wafer, or other tenacious substance capable of being impressed.³ But, in practice, the seal of an individual is usually a plain piece of paper, without device, attached to the deed with a wafer or otherwise; while the seal of a corporation may exhibit a device to give it a distinctive character. A mere stamp on the paper upon which the instrument is written, whether made by an individual or by a corporation, without the use of wax or wafer, is insufficient at common law;⁴ nor would an

¹ *Lewis v. Payn*, 8 Cow. 71; *Bolton v. Carlisle*, 2 H. Bl. 259; and see *Davidson v. Cooper*, 13 M. & W. 343. Title passes by the delivery of a lease, and will not be revested in the lessor by an alteration of the lease by the lessee. *Smith v. McGowan*, 3 Barb. 404. But see, *contra*, *Bliss v. McIntyre*, 18 Vt. 466.

² See § 35, *ante*.

³ *Warren v. Lynch*, 5 Johns. 239; *Perrine v. Cheeseman*, 6 Halst. 174; *Beardsley v. Knight*, 4 Vt. 471. In New York the seal of a corporation may be made by impression directly on the paper. Laws 1848, p. 305.

⁴ *Bank of Rochester v. Gray*, 2 Hill, 227; *Farmers' Bank v. Haight*, 3 *id.* 493. In *Ross v. Bedell*, 5 Duer, 462, the opinion was expressed that an actual seal, stamped upon paper of sufficient tenacity to receive and retain the impression, is a seal within the strict definition of the common law; and see *Curtis v. Leavitt*, 15 N. Y. 89; *Pillow v. Roberts*, 13 How. 472. So in Massachusetts, a corporation may seal by an impression made on paper without wax. *Hendee v. Pinkerton*, 14 Allen, 381; *Royal*

ordinary piece of wax, without an impression upon it, suffice ; for mere wax, without a character, is not a seal.¹ In Pennsylvania, Indiana, Ohio, Wisconsin, Delaware, Florida, Michigan, Minnesota, Oregon, Missouri, Texas, Illinois, Mississippi, Georgia, North Carolina, and perhaps other States, a mere flourish with the pen, at the end of the name, a circle of ink, or a scroll, is allowed in place of a seal, when it appears to have been intended as such.² In Virginia and Alabama, it must appear in the body of the deed that there was an intention to substitute the scroll for a seal.³ In Maryland a scroll has always been considered a seal, and it need not appear that the party intended to adopt it ;⁴ while in South Carolina it is good, unless the intention to seal in a more formal manner can be presumed from the face of the instrument.⁵ Kentucky has substituted a scroll for a wax or wafer impression, by statute.⁶ Generally, if by the attestation clause, it appears that the instrument was designed to be a sealed instrument, and there is anything affixed to it, or connected with it which

Bank v. Gr. Junc. R. R., 100 Mass. 444. But a mere printed seal not impressed on the paper is not a good corporate seal. *Bates v. Boston & N. Y. R. R.*, 10 Allen, 251 ; though otherwise in Maine. *Woodman v. York & C. R. R.*, 50 Me. 549. It is held that there is a sufficient mutuality of contract and of consideration to constitute a binding lease, when one party signs with a seal, and the other without, no objection having been made thereto when the leases passed. *Rice v. Brown*, 81 Me. 56. It is held not necessary to the validity of a lease that the lessee should affix his seal thereto. His acceptance is shown by claiming and occupying under it and paying rent. *Crescent City Water Co. v. Simpson*, 77 Cal. 286. In Alabama, where a rental contract and, also, rental notes are signed by the tenant, the signature of the landlord to the contract is not necessary to make the contract and notes binding on the tenant. *Lagerfelt v. McKie*, 100 Ala. 430. After a lease invalid for want of acknowledgment has been fully performed, neither party can take advantage of its invalidity. *Mounts v. Goranson*, 29 Wash. 261.

¹ *Perry v. Price*, 1 Mo. 553 ; 2 Bl. Com. 297 ; *Warren v. Lynch*, 5 Johns. 239.

² *Alexander v. Jameson*, 5 Binn. 238 ; *Bradfield v. McCormick*, 3 Blackf. 161 ; *Jones v. Logwood*, 1 Wash. 42.

³ *Austin v. Whitlock*, 1 Munf. 487 ; *Lee v. Adkins*, 1 Minor, 187.

⁴ *Trasher v. Everhart*, 3 Gill & J. 234 ; *Stabler v. Cowman*, 7 *id.* 284.

⁵ *Relph v. Gist*, 4 McCord, 267.

⁶ *Bohannons v. Lewis*, 8 T. B. Mon. 376.

can be regarded as a seal, it will, *prima facie*, be taken to be a deed; and proof of the party's signature by the subscribing witnesses, if there be such, or by any other legitimate mode, will be presumptive evidence that he sealed it.¹ As to the number of seals required to a deed, there appears to be no necessity that, when executed by several persons, each shall have a separate seal; for several persons may bind themselves by one seal, if it appears that the seal affixed was intended to be adopted as a common seal.²

§ 167. **Delivery, what constitutes.** — A deed takes effect so as to vest the estate or interest to be conveyed only from its delivery to the grantee or to a third person, authorized to receive it.³ Actual manual delivery is not necessary when it is understood by all parties that delivery is made. Delivery is complete when the grantor has put it beyond his power to revoke or reclaim the instrument.⁴ If the approval of a third person is necessary to make a delivery valid, it becomes operative from the time such approval is given, although it may have been executed before.⁵ Almost any manifestation of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery. If the date be false or impossible, the delivery ascertains the time when the instrument is to take effect; but it will be presumed, *prima facie*, to have been delivered on the day of its date,⁶

¹ *Supra*, and see *Ball v. Taylor*, 1 C. & P. 417.

² *Mackay v. Bloodgood*, 9 Johns. 285; *McDill v. McDill*, 1 Dall. 63; *Yarborough v. Monday*, 2 Dev. 493; *Ball v. Dunsterville*, 4 T. R. 313; *Stabler v. Cowman*, *supra*; *Townsend v. Hubbard*, 4 Hill, 351; *Univ. of Vt. v. Joslyn*, 21 Vt. 52. This case holds that the intention may be drawn from the lease itself in the absence of any other evidence.

³ *Jackson v. Hill*, 5 Wend. 532; *Shep. Touch.* 57; 4 Cruise, § 52. A return or redelivery of the deed to the grantor does not revest the title: *Jackson v. Anderson*, 4 Wend. 474; *Roe v. York*, 6 East, 86; *Jackson v. Chase*, 2 Johns. 84; *Jackson v. Wood*, 12 *id.* 73; *Verplanck v. Sterry*, 12 Johns. 536; *Kellogg v. Rand*, 11 Paige, 59. A subsequent pledge of the deed with the grantor gives him an equitable lien merely. *Jackson v. Parkhurst*, 4 Wend. 209.

⁴ *Scrugham v. Wood*, 15 Wend. 545; *Brown v. Austen*, 35 Barb. 341; *Maynard v. Maynard*, 10 Mass. 456; *Doe v. Knight*, 5 B. & C. 671.

⁵ *Co. Lit.* 36; *Church v. Gilman*, 15 Wend. 656; 1 R. S. 738.

⁶ 2 Bl. Com. 307; *Goodrich v. Walker*, 1 Johns. Cas. 250; *Trustees*

notwithstanding it was not acknowledged until afterwards.¹ There can be no delivery without an acceptance express or implied:² but the acceptance of the grantee may be presumed from the beneficial nature of the transaction;³ or where the deed is shown to have been executed at his request.⁴

§ 168. *Inferred from Record and other Circumstances.*—It is not essential to a valid delivery that it be made to, or accepted by, the lessee personally at the time of the alleged delivery; for acceptance may be presumed from many other circumstances.⁵ Thus, the registry of a deed, at the request of the grantor, for the use of the grantee and the grantee's *v. Robinson, Wright*, 436. In New York, the presumption that a deed was delivered on the day it bears date does not prevail in respect to deeds not acknowledged, proved, nor witnessed; nor where the deed is proved to have been in the hands of the grantor at a period subsequent to its date, *Elsev v. Metcalf*, 1 Den. 323, nor where the certificate of acknowledgment before the subscribing witnesses is of a later date. *McIntyre v. Strong*, 48 N. Y. 127.

¹ *McConnell v. Brown*, Litt. Sel. Ca. 459.

² *Jackson v. Richards*, 6 Cow. 617; *Jackson v. Phipps*, 12 Johns. 421; *Shep. Touch.* 57. Where a lease was signed by the lessees but never delivered to them, and was assigned by them at the request of the lessor's agent, and delivered to the agent, and the first instalment of rent was received by the lessor from the assignee, the original lessees never became obligated to pay the rent. *Stetson v. Briggs*, 114 Cal. 511, and see *James v. Kibler*, 94 Va. 165.

³ *Jackson v. Bodle*, 20 Johns. 187; *Belden v. Carter*, 4 Day, 66; *Wheelright v. Wheelright*, 2 Mass. 447; *Maynard v. Maynard*, 10 *id.* 456. Although the law will presume the acceptance of a lease, executed and delivered for the use of the lessee, if beneficial to him, yet this question is to be determined, not from the face of the instrument merely, but from the nature and circumstances of the entire transaction. *Camp v. Camp*, 5 Conn. 300. And see *Hayes v. Lawver*, 83 Ill. 292; *McFarlane v. Williams*, 107 *id.* 33; *Twombly v. Monroe*, 136 Mass. 464, where the lease appears to have been executed by the lessor for the purpose of dispossessing the tenant at will in possession.

⁴ *Church v. Gilman*, 15 Wend. 656; *Clark v. Gordon*, 121 Mass. 330.

⁵ *Hatch v. Hatch*, 9 Mass. 307; *Belden v. Carter*, 4 Day, 66. An actual, manual transfer of the instrument in writing required by the Statute of Frauds is not in all cases necessary. If the grantee, by formal assent, or unequivocal acts, such as entering into possession, treats the writing as in his possession, it is sufficient. *Witman v. Reading*, 191 Pa. 134.

subsequent assent thereto, will be *prima facie* evidence of an actual delivery;¹ and a subsequent possession of the deed by the grantee would be evidence of its delivery to him.² The putting a deed in the post-office, directed to the grantee, has been held to be sufficient evidence of a delivery;³ but merely sending it to a third person, or depositing it in the clerk's office for record, is not sufficient unless this is shown to have been done for the grantee's use.⁴ Where a recorded deed, purporting to have been delivered, is lost, the presumption is that it was delivered; but this presumption will be rebutted if the original deed is produced by the grantor, or if neither the grantee nor any person on his behalf, was present at the attestation.⁵ The non-delivery of a deed may be shown by parol evidence; and the grantee is an admissible witness for that purpose.⁶ But its delivery cannot be proved by showing declarations of the grantor's intention to deliver prior to its delivery, and of the subsequent possession of the land by a tenant with the assent of a grantor.⁷ And there can be no valid delivery of a deed after the grantor's death; nor of one which has been executed in blank, to be filled up afterwards by the person to whom it was delivered.⁸

§ 169. **Delivery as an Escrow, Effect of.** — A lease may be delivered as an *escrow*, which means a delivery to a stranger, to be kept by him until certain conditions shall have been performed, and then to be delivered over to the grantee. Until the condition is performed and the deed delivered, the estate

¹ *Hedge v. Drew*, 12 Pick. 141; *Elsey v. Metcalf*, 1 Den. 323; *Chess v. Chess*, 1 Penn. 32; *Gilbert v. N. A. F. I. Co.*, 23 Wend. 43.

² *Maynard v. Maynard*, 10 Mass. 456; *Rathbun v. Rathbun*, 6 Barb. 98.

³ *McKinney v. Rhoads*, 5 Watts, 343.

⁴ *Elsey v. Metcalf*, *supra*.

⁵ *Powers v. Russell*, 13 Pick. 69.

⁶ *Roberts v. Jackson*, 1 Wend. 478; *Jackson v. Richards*, 6 Cow. 617. But evidence will not be admitted to show that the delivery was in fact conditional, when it appears that the lease was executed and delivered by the lessor, upon a parol promise by the lessee that in a few days he would make out another lease to the satisfaction of the lessor. *Brownell v. Haskell*, 22 Pick. 310.

⁷ *Hale v. Hills*, 8 Conn. 39.

⁸ See § 146, *ante*; *Jackson v. Leek*, 12 Wend. 105.

remains in the grantor;¹ but when the condition has been performed, and the deed is finally delivered, it takes effect as from the time of its first delivery,² notwithstanding one of the parties may have died before the condition was performed.³ And if it be duly delivered in the first instance, it will operate, although the grantee afterwards suffers it to remain in the custody of the grantor.⁴ But there cannot be a delivery to the grantee himself as an *escrow*, to take effect upon the performance of a condition not expressed in the deed; but such a delivery will at once become absolute in law.⁵ It will not, however, take effect as an operative interest, although left in the hands of the grantee, if it was only left for the purpose of being sent to a third person to remain in *escrow*.⁶ Neither can it be delivered to a third person to be kept during the pleasure of the parties, and made subject to their further order: such a delivery is not an *escrow*, but a mere deposit.⁷ And a deed actually delivered by an agent to one for whom it is made is no longer an *escrow*, though placed in the hands of such agent under an agreement that it should be considered an *escrow*.⁸ But a deed delivered as an *escrow* will not take effect until the condition is performed, except where the operation of the conveyance would be absolutely defeated, unless the first delivery should be permitted to have an effect.⁹

¹ *Green v. Putnam*, 1 Barb. 500; *Jackson v. Richards*, 6 Cow. 619.

² *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Catlin*, 2 Johns. 248; *Bushell v. Pasmore*, 6 Mod. 217; 8 Prest. Abstr. 104.

³ *Hunter v. Hunter*, 17 Barb. 25, 82; *Shep. Touch.* 59.

⁴ *Souverbye v. Arden*, 1 Johns. Ch. 240; *Doe v. Knight*, 5 B. & C. 671. Where the deed of A. and the note of B. were deposited with C. to be delivered in exchange when both parties should direct, this was held to be a delivery in *escrow*. In order to create the *escrow*, it is not necessary that the word *escrow* should be used; the intent of the parties will prevail. *Clark v. Gifford*, 10 Wend. 810.

⁵ *Arnold v. Patrick*, 6 Paige, 310; *Worrall v. Mumm*, 5 N. Y. 229; *Lawton v. Sager*, 11 Barb. 349. A deed delivered to the grantee is not an *escrow*; such delivery either takes effect absolutely or works nothing. *Braman v. Bingham*, 26 N. Y. 483.

⁶ *Gilbert v. N. A. Ins. Co.*, *supra*.

⁷ *James v. Vanderheyden*, 1 Paige, 885.

⁸ *Simonton's Estate*, 4 Watts, 180.

⁹ *Jackson v. Rowland*, 6 Wend. 666.

§ 170. **Witnesses.** — The execution of a lease by parol is complete without a witness; but to a lease by deed two witnesses are required by the statute in several States,¹ although by the common law, no attesting witness is necessary to the validity of a deed.² In New York, proof of its execution, made by one witness, or its acknowledgment by the party before the proper officer without a witness is sufficient to entitle it to be recorded.³ Formerly a proper revenue stamp was also necessary, and if omitted at the time of execution with intent to defraud, the lease was invalid.⁴ Where several parties join in one agreement, only one stamp is necessary.⁵ And if a material alteration is made in a lease after it has become an available document, or in an agreement for a lease which has been already stamped, it must be restamped.⁶

§ 171. **Record, Effect of.** — The statutes of every State require that transfers of land, including leases, except certain minor chattel interests, shall, in order to secure the priority to which they may be entitled, be recorded in the county in which the premises are situated, after being first acknowledged or proved; and, if not so recorded, they are void as against a subsequent incumbrancer or purchaser of the same premises, in good faith, and for a valuable consideration, whose convey-

¹ As in New Hampshire, Vermont, Rhode Island, Connecticut, Ohio, Georgia, Illinois, Kentucky, and Indiana. In Delaware, Tennessee, Mississippi, Maryland, and South Carolina, two witnesses are necessary where the deed is to be proved by witnesses.

² 4 Kent, Com. 449; *Wicks v. Caulk*, 5 Har. & J. 36; *Long v. Ramsey*, 1 S. & R. 72; *Sicard v. Davis*, 6 Pet. 124.

³ 1 N. Y. R. S. 738, § 137. A deed without any witness or acknowledgment is good as against the grantor. 2 Bl. Com. 296; *Champl. & St. L. R. R. v. Valentine*, 19 Barb. 484.

⁴ *Holyoke Machine Co. v. Franklin Paper Co.*, 97 Mass. 150; *Vorebeck v. Roe*, 50 Barb. 302; *Blunt v. Bates*, 40 Ala. 470, 475. But this provision has been held operative only in the United States courts; *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, *id.* 458. Under the English Stamp Act, an unstamped lease is not invalid, but it cannot be read in evidence. *Buxton v. Cornish*, 12 M. & W. 426.

⁵ *Davis v. Williams*, 18 East, 282.

⁶ *Reed v. Deere*, 7 B. & C. 261.

ance shall first be duly recorded.¹ But actual notice of a conveyance is equivalent to the record of it.² And a lease which has not been recorded is valid as between the parties.³ [In some jurisdictions, open, notorious, and exclusive possession of the demised premises, is equivalent to notice; and it is held that such possession need not be by the owner's personal occupancy, but that the possession of his tenant is

¹ In New York, all conveyances of land including leases of three years and upwards, must be recorded. 1 R. S. 762, § 38. In Massachusetts, leases of seven years and upwards, Gen. Stat. c. 89, §§ 1 & 3. In Maryland an unrecorded lease of more than seven years is held to be void. *Anderson v. Critcher*, 11 Gill & J. 450. In Vermont a lease of lands for more than one year, not acknowledged or recorded, is ineffectual as against any but the grantor and his heirs. G. S. c. 65, § 7. *Buswell v. Marshall*, 51 Vt. 87. In New Jersey, P. L. 1898, p. 670, § 1, leaseholds for not less than two years are to be recorded. *Lembeck Co. v. Kelly*, 63 N. J. Eq. 402. See *Hodge v. Giese*, 43 *id.* 342. In Washington, assignments of leases need not be recorded. *Tibbals v. Iffland*, 10 Wash. 451. A lease for a term of years duly recorded has priority over a mortgage in the hands of an assignee and executed subsequent to the recording of the lease; although the assignment was made after foreclosure. *Enos v. Cook*, 65 Cal. 175. A lease of premises for the term of five years, containing a provision that the "lessee is to have the privilege of renewing this lease upon the same terms for the further term of five years," is a "lease for more than seven years from the making thereof," within the meaning of the statute (P. S. c. 120, § 4), which, if not recorded as therein required, will, so far as it purports to give the lessee the right to a second term of five years, be invalid as against a purchaser without actual notice of the lease. *Toupin v. Peabody*, 162 Mass. 478.

² *Tuttle v. Jackson*, 6 Wend. 213; *State of Conn. v. Bradish*, 14 Mass. 296; *Porter v. Cole*, 4 Greenl. 20; *Tart v. Crawford*, 1 McCord, 265; *West v. Randall*, 2 Mason, 206; *Colby v. Kenniston*, 4 N. H. 262; *Weaver v. Coumbe*, 15 Neb. 167; *Jackson v. Winslow*, 9 Cow. 13; *Jackson v. Phillips*, *id.* 94; *Jackson v. Post*, *id.* 120; *McCardell v. Williams*, 19 R. I. 701. In Pennsylvania, leases for less than twenty-one years where the actual possession goes with the lease are excepted from the operation of the recording acts. *Marsh v. Nelson*, 101 Pa. St. 51. In New York, the term "purchaser" is construed to include an assignee of a lease or mortgage. 2 R. S. 762, § 37. The rule which makes unrecorded leases binding upon the parties is applied to leases which want the acknowledgment, *Johnson v. Phenix Mut. L. Ins. Co.*, 46 Conn. 92, and to assignments of leases. *Stillman v. Harvey*, 47 *id.* 26.

³ *Anthony v. New York, Prov. & Boston R. R.* 162 Mass. 60. So as to a written lien for rent. *Davis v. Days*, 42 S. C. 69.

effectual.¹ The burden of proof to show such a possession is upon the tenant.² Generally an unrecorded lease cannot be used in evidence;³ but an unrecorded lease may be so used, if recorded before the close of the trial, or, perhaps, before judgment, no title of record intervening.⁴]

¹ *Levy v. Holberg*, 67 Miss. 526. It is clear that such possession must generally be admissible as evidence of ownership.

² *Dreyfus v. Hirt*, 82 Cal. 621; *Garber v. Gianella*, 98 *id.* 527. It seems that in Louisiana an unrecorded lease has no effect with regard to third persons and creditors. *Cochrane v. Gibert*, 41 La. An. 785; *Flower v. Pearce*, 45 *id.* 853.

³ It has been held that a lease not recorded as required by statute is evidence to show the terms upon which the occupant held the property. *Emrich v. Union Stock Yard Co.*, 86 Md. 482.

⁴ *Anthony v. New York, Prov. & Boston R. R.*, 162 Mass. 60.

CHAPTER VI.

OF RIGHTS AND LIABILITIES GENERALLY INCIDENT TO A
TENANCY.

§ 172. **Reciprocal Rights and Duties of the Parties, generally.**
— Before proceeding to examine the particular rights and liabilities of the respective parties to a demise, it may be profitable to consider some of the general obligations incident to the relation of landlord and tenant, but which do not usually fall within the scope of the covenants between the parties. Upon the making of a lease, rights and liabilities attach to each of the parties, not only in respect to each other, but also in regard to other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with his possession; while the tenant assumes corresponding obligations. By virtue of his right of exclusive occupation, a tenant becomes entitled to use the premises, in the same manner as the owner might have done, except that he must do no act to the injury of the inheritance.¹ He may be bound to support and repair bridges, roads, division fences, and party-walls. He is obliged to make good any damage that may be occasioned by his neglect to keep the premises in a safe condition, or to use them in a reasonable and prudent manner. His possessory interest will enable him to defend himself against all trespasses upon the premises, as well as against a disturbance, nuisance, or other offensive erection so near his dwelling as to render it useless or unfit for habitation.² If there are ways, commons, fisheries, or other privileges or easements attached to

¹ *Jackson v. Brownson*, 7 Johns. 227, 234; *Bradstreet v. Pratt*, 17 Wend. 44; *Livingston v. Reynolds*, 2 Hill, 157.

² *Willard v. Tillman*, 2 Hill, 274; *Moffat v. Smith*, 4 N. Y. 126; *Day v. Swackhamer*, 2 Hilt. 4; *Texas & Pac. R. R. v. Bayliss*, 62 Tex. 570.

the estate, they must be used in such a reasonable manner as not to infringe upon the rights of others who are equally entitled to the enjoyment of them with himself. And if he have a right to remove buildings, or to mine and dig the soil, he is not to exercise it regardless of the effect such operations will have upon the house or land of his neighbor.

SECTION I.

ON THE PART OF THE LANDLORD.

§ 173. **May protect his Reversionary Rights, and how.**— After the making of a contract of lease, the right of possession in legal contemplation remains in the lessor until the contract is to be consummated by the entry of the lessee. After that period, the right of possession is changed, and the tenant is in a position to enforce this right by an action of ejectment;¹ and, after entry, to bring actions for injuries to his possession. The landlord's rights, after the tenant's entry, are confined to the protection of his reversionary interest merely; that is, to the maintenance of actions for such injuries as would, in the ordinary course of things, continue to affect such interest after the determination of the lease; whether the injury be committed by a tenant, an under-tenant, or a stranger, and whether the term shall have expired or not;² and notwithstanding he may not have an

¹ But the possession of the tenant is for many purposes that of the landlord. *Vanduyner v. Heffner*, 45 Ind. 589.

² *Starr v. Jackson*, 11 Mass. 519; *French v. Fuller*, 23 Pick. 104; *Jackson v. Pesked*, 1 M. & S. 234; *Jesser v. Gifford*, 4 Burr. 2141; *Baxter v. Taylor*, 4 B. & Ad. 72; *Bower v. Hill*, 1 Bing. (N. C.) 555; *Little v. Pallister*, 3 Greenl. 6; *Austin v. Huds. Riv. R. R.*, 25 N. Y. 334; *Geer v. Fleming*, 110 Mass. 39; *Aycock v. Railroad*, 89 N. C. 321; *Mayor v. Lyon*, 69 Ga. 577. It seems that at common law the landlord had the right to defend an action of ejectment against the tenant. *Sutton v. Casselegi*, 77 Mo. 397; *Jackson v. Allen*, 30 Ark. 110; *Bryant v. Kinlaw*, 90 N. C. 337; and see *Wissenhunt v. Jones*, 78 *id.* 361; *Same v. Same*, 80 *id.* 348; *Maddrey v. Long*, 86 *id.* 383. In such an action, if the landlord assumes the defence he is bound, thereafter, by the judgment, *McCreery v. Everding*, 54 Cal. 168, when it appears that the subject-

immediate interest in the estate at the time of commencing the action, as if there be an intervening estate for life or for years.¹ Of such actions are those for breaking the windows of a house; stopping up a rivulet, whereby the timber on the estate becomes rotten;² the erection of an unwholesome nuisance near the premises³ [permitting the premises to be used as a hospital for infectious diseases⁴]; undermining the foundations of a house;⁵ or for not sustaining a sea-wall, whereby the property was injured; cutting down trees, and the like.⁶ He may also by injunction restrain the commission of such injurious acts; or prevent a lessee from converting the premises to uses that are inconsistent with the terms of the lease, from making material alterations in the buildings, or committing other species of waste.⁷ But the injury complained of must be of such a character as permanently to affect the inheritance;⁸ and a mere disturbance, if not of a continuous nature, even though done in the assertion of a right, will not entitle the reversioner to an action.⁹ Yet,

matter, formerly, was the same, and that the case was submitted and decided on its merits. *Altschul v. Polack*, 55 *id.* 633.

¹ *Robinson v. Wheeler*, 25 N. Y. 252; *Van Dusen v. Young*, 29 Barb. 9.

² *Bedingford v. Onslow*, Lev. 3, 209; *Ray v. Ayers*, 5 Duer, 494; *Anderson v. Dickie*, 26 How. Pr. R. 105; and though the tenant has a privilege of buying, the insurance money is the landlord's until the option is exercised. *Gilbert v. Post*, 28 Ohio St. 276.

³ It is held that if the tenant uses the premises in such a manner as to create a nuisance, the landlord has a right to abate it. *Kurrus v. Seibert*, 11 Bradw. (Ill.) 319; but see § 174, *post*.

⁴ *Hersey v. Chapin*, 162 Mass. 176.

⁵ *Barrow v. Richards*, 8 Paige, 351; *Reynolds v. Clarke*, 2 Ld. Ray. 1399; *Smith v. Martin*, 2 Saund. 397.

⁶ *Taylor v. Cole*, 3 T. R. 292; *Dodd v. Hohne*, 1 Ad. & E. 493; and see § 775, *post*.

⁷ *Kane v. Vanderburg*, 1 Johns. Ch. 11; *Douglas v. Wiggin*, *id.* 435; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Grey de Wilton v. Saxton*, 6 Ves. 106. And see § 693, *post*. The sublessee may be restrained without making the lessee a party. *Maddox v. White*, 4 Md. 72.

⁸ *Queen's Coll. v. Hallett*, 14 East, 489; *Otto v. Grice*, 4 Dev. 477.

⁹ *Baxter v. Taylor*, 4 B. & Ad. 72. A reversion is an estate which remains in the grantor and his heirs, and which is to take effect in possession upon the determination by its own limitation of an outstanding

if any one interferes with his tenants so far as to disturb their enjoyment, and thereby cause a loss of rent or other damage,¹ the landlord may have an action; and, if the disturbance is continued, he may, from time to time, bring a fresh action.² [And it is held that when judgment is rendered against tenants, ousting them from possession, in a proceeding of which their landlord had no notice, he may by suit not only restrain the execution of the writs of possession, but is entitled to have the case reopened and defeat the original action in a trial *de novo*.³] If a stranger enters upon the premises and cuts down trees, the landlord, immediately upon the severance, acquires such a right of possession as will enable him to recover them in an action of trover.⁴ But [the early cases hold that] he may not bring an action of trespass for an injury to the land while there is a tenant for years lawfully in possession; for the ground of such an action is injury to the immediate possession, and the plaintiff must have been in either the actual or constructive possession when the trespass was committed.⁵

particular estate. A right to enter and resume the possession for a breach of a condition is not a reversion. *Phenix v. Com'rs of Emigration*, 12 How. Pr. R. 1; see § 16, *ante*, and note.

¹ *Aldridge v. Stuyvesant*, 1 Hall, 214.

² *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

³ *Moser v. Hussey*, 67 Tex. 456.

⁴ *Berwick v. Whitfield*, 3 P. Wms. 267; *Berry v. Heard*, Cro. Car. 242; *Schermerhorn v. Buell*, 4 Den. 422.

⁵ *Campbell v. Arnold*, 1 Johns. 511; *Tobey v. Webster*, 3 *id.* 468; *Catlin v. Hayden*, 1 Vt. 375; *Robertson v. George*, 7 N. H. 306; *Gould v. Sternberg*, 4 Bradw. (Ill.) 439. So not where a tenant from year to year, or a tenant at will, is in possession: *French v. Fuller*, 23 Pick. 104; *Hersey v. Chapin*, *supra*, though otherwise, if the tenancy is strictly at will or at sufferance. The technical action of trespass is here intended, in contradistinction to the actions of trespass on the case before referred to. See § 764, *post*. In Missouri, it is said that the earlier cases in that State intimate that actual possession is essential to maintain an action of trespass to the close, and that the landlord cannot maintain such an action while his tenant is in possession. *Roussin v. Benton*, 6 Mo. 593. Later decisions adopt the rule generally recognized, that, where the injury is one permanent to the freehold, the landlord may sue for it even though his tenant be in possession. *Cramer v. Groseclose*, 53 Mo. App. 648.

§ 174. **Right to enter Premises strictly a Reserved Right.— Its Incidents.** — The landlord generally reserves the right to enter upon the premises, for the purpose of ascertaining if waste or injury has been committed by the tenant or other person; first giving notice of his intention to do so; but, strictly, he has no such right unless he reserves it, for every unauthorized entry, whether an injury be thereby inflicted or not, is a trespass.¹ He may use all ways appurtenant to the premises for the purpose of demanding rent, making such repairs as are necessary to prevent the waste of the premises, or removing obstructions.² But where the rent is payable in produce, to be delivered from the farm to the landlord, he is not authorized to go upon the land and take it, until it is delivered to him by the tenant, or has been severed, and set apart for his use.³ If, by the terms of the lease, he has reserved the right to enter and repair, he is not liable for any damages resulting from its exercise, unless

¹ *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Dixon v. Clow*, 24 Wend. 188; *Parker v. Griswold*, 17 Conn. 288; *Shannon v. Burr*, 1 Hilt. 39; *State v. Piper*, 89 N. C. 551; *McGee v. Gibson*, 2 Ky. 353. A covenant for a landlord to be allowed to enter a house to see the state of the repairs at convenient times is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. *Doe v. Bird*, 6 C. & P. 195. A covenant that the landlord may enter in certain months to make repairs is broken by his entry at other times, and the fact that repairs are necessary will not justify the entry. *Goebel v. Hough*, 26 Minn. 252. The tenant may have damages from his landlord by reason of the careless destruction by the latter of the leased property; as by fire, although the lease allows the landlord one half the pasturage on the leased premises. *Teagarden v. McLaughlin*, 86 Ind. 476.

² *Proud v. Hollis*, 1 B. & C. 8; *Penley v. Watts*, 7 M. & W. 601; *Shaw v. Cumiskey*, 7 Pick. 76; *Petersen v. Edmonsens*, 5 Harr. 378. It has been held that an immediate lessee may recover, as special damages, from an under-lessee who holds under similar covenants, the cost of defending an action, as well as the damages under it, brought by the original lessor for want of repairs; because, during the term of the under-lessee, he could not have entered for the purpose of repairing without making himself a trespasser. *Neale v. Wyllie*, 3 B. & C. 533; *Barker v. Barker*, 3 C. & P. 557. But this doctrine has been overruled in *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 *id.* 249.

³ *Dockham v. Parker*, 9 Greenl. 187; *Woodruff v. Adams*, 5 Blackf. 817.

the work has been performed in a wanton, unskilful, or negligent manner.¹ Where the statute requires the consent of the owner to work to be done in altering or repairing the demised premises by order of the tenant, his reversionary interest cannot, without such consent, be subjected to a mechanic's lien, although he stood by and observed the progress of the work.²

§ 175. **Liability to Strangers for Injuries, what.** — The landlord's liabilities, in respect of possession, are in general suspended as soon as the tenant commences his occupation.³ [For where there is neither privity of estate nor privity of contract, the owner of premises is not liable for injuries sustained by third persons unless, by invitation, express or implied, the owner induces them to come upon the premises.⁴] But where injuries result to a third person from the faulty or defective construction of the premises,⁵ or from their ruinous condition

¹ *Turner v. McCarthy*, 4 E. D. Smith, 247; *White v. Mealis*, 5 Jones & S. 72.

² *Francis v. Sayles*, 101 Mass. 485; *Conant v. Brackett*, 112 *id.* 18; *McClintock v. Criswell*, 67 Pa. St. 183. This lien is statutory, and varies in the different States. The right to a lien attaches upon the property of the party contracting only to the extent of his interest. Whether it might lie against the lessee's interest, *quære*. *Ombony v. Jones*, 19 N. Y. 234; *Ernst v. Reed*, 49 Barb. 367; *Smith v. Covey*, 3 E. D. Smith, 642; *Doughty v. Devlin*, 1 *id.* 625.

³ *Cheetham v. Hampson*, 4 T. R. 818; *Eakin v. Brown*, 1 E. D. Smith, 36; *Mayor v. Corlies*, 2 Sandf. 301; *St. Louis v. Kaime*, 2 St. Lo. Mo. App. 66; *Cleveland Coop. Stove Co. v. Wheeler*, 14 Bradw. (Ill.) 112; *Shindelbeck v. Moon*, 32 Ohio St. 264; *Brown v. White*, 202 Pa. 297; *Rider v. Clark*, 132 Cal. 382. The analogy is direct to the rule which holds the owner of real estate not liable for injuries caused by the employees of a contractor to build upon the premises. In each case the control is parted with. *Hilliard v. Richardson*, 3 Gray, 349; *Meany v. Abbott*, 6 Phila. 256; *Blake v. Ferris*, 5 N. Y. 48. A statute provision that the "owner" of a factory shall provide fire escapes is held not to apply to the owner in fee not in possession, but to the tenant in possession occupying the premises as a factory, — the word "factory" being construed to include machinery, engines, and power, owned by, and in the control of, the tenant. *Schott v. Harvey*, 105 Pa. 222; *Keely v. O'Conner*, 106 *id.* 321; *Lee v. Smith*, 42 Ohio St. 458.

⁴ *Clyne v. Helmes*, 61 N. J. L. 358.

⁵ *King v. Pedley*, 1 Ad. & E. 827; *Pickard v. Collins*, 28 Barb. 444;

at the time of demise,¹ or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary use of the premises;² the landlord is still liable notwithstanding

Scott v. Simons, 54 N. H. 426; *Durant v. Palmer*, 5 Dutch. 544; *Swords v. Edgar*, 59 N. Y. 28; *Wenzler v. McCotter*, 22 Hun, 60; *Larue v. F. Hotel Co.*, 116 Mass. 67; *Learoyd v. Godfrey*, 138 *id.* 315. The civil liability attaches although the landlord is a lunatic. *Morain v. Devlin*, 132 Mass. 87.

¹ *Bellows v. Sackett*, 15 Barb. 96; *Todd v. Flight*, 9 C. B. n. s. 377; *Moody v. Mayor*, 43 Barb. 482; *Peoria v. Simpson*, 110 Ill. 294; *Reichenbacher v. Pahmeyer*, 8 Bradw. (Ill.) 217; *Marshall v. Heard*, 59 Tex. 266; *O'Connor v. Andrews*, 81 *id.* 28; *Eakin v. Brown*, *supra*; *Nelson v. Liv. Brew. Co.*, 2 L. R. C. P. Div. 311.

² *Fish v. Dodge*, 4 Denio, 311; *State v. Massey*, 72 Vt. 210; *John Morris Co. v. Southworth*, 154 Ill. 118; *Stoetzle v. Swearingen*, 90 Mo. App. 588; *House v. Metcalf*, 27 Conn. 631. In this case the owner of a mill was held for injuries to plaintiff by his horse becoming frightened by the sails of the mill, worked by a tenant. The liability is put on the ground of principal and agent. On like ground, the landlord is held liable for the acts of his tenant in polluting the waters of a natural watercourse running through the premises by discharging sink water therein, if the leased building is adapted to be used in the manner complained of. *Jackman v. Arlington Mills*, 137 Mass. 277. So *Owings v. Jones*, 9 Md. 108. A coal shoot or other excavation beneath or at the public highway, has been considered an incipient nuisance *per se*: *Congreve v. Smith*, 18 N. Y. 79; *Jennings v. Van Schaick*, 108 N. Y. 530; *Whalen v. Gloster*, 4 Hun, 24; *Irvine v. Wood*, 51 N. Y. 224; *Collier v. Hyatt*, 110 Ga. 317; and *Stratton v. Staples*, 59 Me. 94, may have proceeded on this ground. In *Swords v. Edgar*, *supra*, a similar liability seems to have attached to the ownership of a wharf, from its *quasi* public character. But in *Ditchett v. S. D. R. R.*, 67 N. Y. 425, a railroad company lessor was held not to be responsible for the condition of the fences at a public highway crossing, if these were in good condition when demised. See *Miller v. N. Y., L. & W. R. R.*, 125 N. Y. 118. If a derrick is maintained by a license on the licensor's land, with a guy rope stretched across the highway, so low as to be dangerous to travellers on the way, and the owner of the land knows of its existence and suffers it to remain there, this constitutes a nuisance for the injurious consequences of which the landowner is liable, although the derrick was erected before he became the owner of the land. *Rockport v. Rockport Granite Co.*, 177 Mass. 246. The liability rests upon a tenant who sublets the premises knowing or being chargeable with knowledge of the existence of the nuisance. *Timlin v. S. O. Co.*, 126 N. Y. 514, distinguishing *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245. Whether the knowledge of the existence of a nuisance on the demised premises is necessary to establish

the lease [although, as between lessor and lessee, the latter is presumably liable for a nuisance upon the leased premises¹]. So where the landlord knowingly demises the tenement for a purpose for which it is unfit, he has been held liable to strangers for injury suffered by them while it is so used² [or to another tenant of adjacent property³]. And if he holds or resumes control of the premises pending the lease,⁴ or renews the lease, or grants another lease while the nuisance continues, he becomes liable for their condition thereafter.⁵ And where

the landlord's liability therefor, *quære*. There are cases which affirm his liability for a nuisance which was a probable result of the use for which the premises were leased (*Fish v. Dodge*, 4 Den. 311; *Rex v. Pedley*, 1 Ad. & E. 822; *Rouse v. Metcalf*, *supra*). *Ingwersen v. Rankin*, 47 N. J. L. 18.

¹ Per Cooley, J., *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164; *Fellows v. Gilhuber*, 82 Wis. 639; *Jaffe v. Harteau*, 56 N. Y. 398; *Ahern v. Steele*, 115 N. Y. 203.

² *Godley v. Haggerty*, 20 Pa. St. 387; *Carson v. Godley*, 26 *id.* 111; *Helwig v. Jordan*, 53 Ind. 201; *Pickard v. Collins*, *Owings v. Jones*, and *Swords v. Edgar*, *supra*. In New York, the court, after laying down the rule that the landlord, unless he has wilfully concealed the defective condition of the demised premises, is not liable for injury resulting to third persons going upon them during the term, have extended the rule to the case of structures erected to be used for a public purpose, as a public amphitheatre built for equestrian or pedestrian exhibitions. (*Ruger, C. J.*, *Danforth and Finch, JJ.*, dissenting) *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245; *Bard v. Same*, 10 Daly, 520.

³ *Albert v. State*, 66 Md. 325; *Brunswick-Balke-Collender Co. v. Rees*, 69 Wis. 442; *Deiters v. St. Paul Gas Light Co.*, 86 Minn. 474. Thus, in the absence of a covenant to repair, a landlord who rents the upper story of a building containing water fixtures in good condition at the time of the lease, and gives the tenant exclusive possession and control thereof, is not liable to a tenant of the lower story for damages caused by some defect in such water fixtures occurring during the term of the lease. *Haizlip v. Rosenberg*, 63 Ark. 430.

⁴ *Canavan v. Conkling*, 1 Daly, 509; *Leslie v. Pound*, 4 Taunt. 649. Where an elevator on the leased premises run by the lessee's servant was to be kept in repair by the lessor, it was held that the lessee was not in such possession or control of the elevator as to be responsible for an accident to a third person resulting from a defect in its construction. *Sinton v. Butler*, 40 Ohio St. 158. See *Parker v. Barnard*, 135 Mass. 116; *Todt v. Wheeler*, 70 Minn. 161 (G. S. Minn. 1894, § 2250); *Olsen v. Schultz*, 67 *id.* 494.

⁵ *Rosewell v. Prior*, 2 Salk. 460; *King v. Pedley*, *supra*; *Vedder v.*

he has covenanted to repair, and the injury arises from this want of repair, although the occupant is in the first instance liable,¹ the landlord may be sued at once to avoid circuitry of action.² Again, while a landlord is not, as such, bound to repair, yet if he assumes to do so, and neglects to perform his obligation, or in performing it, if an injury is caused from want of skill in, or proper selection of, his workmen, he is held therefor.³ But to render him liable the nuisance must be one that necessarily arises from the tenant's ordinary use of the premises for the purpose for which they were let, and not be avoidable by reasonable care on the tenant's part.⁴ [If a nui-

Vedder, 1 Den. 257; Whalen v. Gloster, 4 Hun, 24; Waggoner v. Germaine, 3 Den. 306. Here the owner's grant of land having a dam so high as when filled to flow the neighbor's land, with warranty, subjected the grantor to liability for the damage caused by using the full dam. In Gandy v. Jubber, 5 B. & S. 73, the court held the lessor from year to year liable, because each year was a reletting. But see s. c. *id.* 485. Both lessor and lessee may be sued at once: Plumer v. Harper, 3 N. H. 88; Staple v. Spring, 10 Mass. 72; Brown v. Woodworth, 5 Barb. 550; Rogers v. Smith, 5 Vt. 215; Irvine v. Wood, 51 N. Y. 224; Hutchins v. Smith, 63 Barb. 251. So the assignee of the reversion may be held: King v. Pedley, *supra*, and by any subsequent occupant injured; Staplee v. Spring, *supra*.

¹ Regina v. Watts, 1 Salk. 357; Russell v. Shenton, 3 Q. B. 449; and see § 178, *post*, note, and cases cited.

² Payne v. Rogers, 2 H. Bla. 350; Milford v. Holbrook, 9 Allen, 17; Durant v. Palmer, 5 Dutch. 544, 546; Benson v. Suarez, 43 Barb. 408; Fisher v. Thirkell, 21 Mich. 1; Gridley v. Bloomington, 67 Ill. 47; Nelson v. Liv. Brew. Co., 2 L. R. C. P. Div. 311.

³ Leslie v. Pounds, 4 Taunt. 649; Payne v. Rogers, Benson v. Suarez, *supra*; Gill v. Middleton, 105 Mass. 477; Glickauf v. Maurer, 75 Ill. 289.

⁴ Fish v. Dodge, King v. Pedley, *supra*. In Rich v. Basterfield, 4 C. B. 783, the doctrine of King v. Pedley is criticised. Here a chimney in the demised tenement was so constructed that a coal fire produced a nuisance. It was held that the tenant was bound to abstain from using coal, and that the lessor was not liable if the lessee used it. But this is of questionable soundness. In Gandy v. Jubber, *supra*, a better rule is laid down. "To render the landlord liable, the nuisance must be . . . a normal one; not such, for instance, as a cellar with a flap, which may or may not be a nuisance, according as it is carefully closed or improperly left open." And see Fisher v. Thirrell, *supra*; Leonard v. Storer, 115 Mass. 86; Clifford v. Atlantic Cotton Mills, 146 Mass. 147; Taylor v. Bailey, 74 Ill. 178. McCarthy v. York Co. Savings Bank, 74 Me. 315; Allen v. Smith, 76 *id.* 335.

sance is created by a tenant or by a former owner who has let the premises to a tenant, a grantee who holds subject to the tenancy, as by reason of the receipt of rent after the purchase, is not liable to third persons for the use which the tenant continues to make of the premises, even if this constitutes a nuisance. By letting the premises, however, the landlord authorizes the continuance of a nuisance already existing; but if the premises can be used by the tenant in the manner intended by the landlord, as this is shown by the construction of the premises, or by the terms of the lease, or by other evidence, without becoming a nuisance, then the landlord is not liable for the act or neglect of the tenant which creates the nuisance; and if the tenant creates the nuisance without authority of the landlord, during the term, the landlord is not liable.¹] If it is produced only by the act of the tenant, he alone is responsible.² So if the condition of the premises is not radically defective or wholly ruinous, and the repair falls within the tenant's duty, express or implied, the landlord is not liable for the neglect.³

¹ *Dalay v. Savage*, 145 Mass. 38; *Lufkin v. Zane*, 157 Mass. 117 (criticising expressions contained in *King v. Pedley*, 1 Ad. & El. 822, 827). See also *McCarthy v. York Savings Bank*, 74 Me., 315; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Ahern v. Steele*, 115 N. Y. 203; *Gandy v. Jubber*, 9 B. & S. 15; *Case v. Minot*, 158 Mass. 577.

² *Saltonstall v. Banker*, 8 Gray, 195; *Owings v. Jones*, *supra*; *Taylor v. Mayor*, 4 E. D. Smith, 559; *Fisher v. Thirkell*, *supra*; *Ditchett v. S. D. R. R.*, 67 N. Y. 425; *Ryan v. Wilson*, 87 *id.* 471; *Norton v. Wiswall*, 26 Barb. 618; *Heimstreet v. Howland*, 5 Denio, 68; *Felton v. Deall*, 22 Vt. 170; *Mahoney v. Atl. & S. L. R. R.*, 68 Me. 68; *Harris v. Cohen*, 50 Mich. 824; *Ferguson v. Hubbell*, 26 Hun, 250. So one having the custody of cattle, as lessee of a farm and stock, is liable for damage done by the cattle. *Moulton v. Moore*, 56 Vt. 700.

³ *Mayor v. Corlies*, 2 Sandf. 301; *Radway v. Briggs*, 37 N. Y. 256; *Odell v. Solomon*, 50 N. Y., S. C. 119; *Leonard v. Storer*, 115 Mass. 86; *St. Louis v. Kaime*, 2 Mo. App. 66; *Deutsch v. Abeles*, 15 *id.* 398; *Gridley v. Bloomington*, 67 Ill. 47; *Union Brass Mfg. Co. v. Lindsay*, 10 Bradw. (Ill.) 588; *Bishop v. Bedford Ch.*, 1 Ellis & E. 697. So it was held in *Mellen v. Morrill*, 126 Mass. 545, that the landlord was not liable to a third person who, in passing along a walk leading from the street to the leased building to transact business with the tenant, received injuries by reason of a defect in the walk, although the defect existed prior to the letting. But where the defect existed in a way leading to several tene-

§ 175 *a*. **Liability to Tenant for Injuries.** — The lessor's liability to the lessee is much more restricted. As the lessor does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their condition;¹ for any injury suffered by him during his occupancy on account of their defective condition, or even faulty construction, the tenant cannot make the lessor answerable²

ments leased to different tenants and used in common by the tenants and the public, the landlord was held liable for resulting injuries to third persons, in the absence of an agreement by the tenants to keep the way in repair. *Readman v. Conway*, 126 Mass. 374. As to the landlord's liability to third persons for injuries resulting from a defect in a common stairway leading to rooms leased to different tenants, see *Murr v. Henkel*, 31 Hun, 28. The license to the tenants of a house to enjoy in common the use of a part of the premises imposes no liability on the landlord for injuries resulting to a tenant from a defect in the part so used. *Ivay v. Hedges*, 9 Q. B. D. 80. In *Congreve v. Smith*, and other cases cited, *ante*, making a structure or excavation, at or under the highway, was regarded as imposing a continuous responsibility on the owner, notwithstanding a lease, to keep it always safe. But in *Pretty v. Bickmore*, L. R. 8 C. P. 405; *Gwinnell v. Eames*, 10 *id.* 658, this was held otherwise, and the lessor was held not responsible for a broken flap over a coal shoot, even if broken when demised, if he was not aware of its condition. So see *Fisher v. Thirkell*, *Leonard v. Storer*, *supra*. In *Buesching v. St. Louis Gas L. Co.* 73 Mo. 219, the landlord and tenant were held equally liable for injuries to a third person caused by an excavation at the street level. If the owner of a building who is engaged in furnishing for hire steam-power to adjoining buildings, after leasing a part of his building, continues so to do by means of appliances on the leased premises, he is bound, as to third persons in the employ of his lessee, to keep such appliances reasonably safe. *Poor v. Sears*, 154 Mass. 539.

¹ §§ 327, 328, 382, *post*. In England, by § 12, 48 and 49 Vict. c. 72, in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. *Walker v. Hobbs*, 28 Q. B. D. 458.

² *Brewster v. Defremery*, 83 Cal. 341; *Sherwood v. Scallan*, 2 Bosw. 127; *Doupe v. Genin*, 1 Sweeny, 25; 45 N. Y. 119; *Joyce v. De Giverville*, 2 Mo. App. 596; *Hazlett v. Powell*, 30 Pa. St. 298; *Jaffe v. Harteau*, 56 N. Y. 398, 401; *Greene v. Hague*, 10 Bradw. (Ill.) 598. And the rule is held although, as to the preceding tenant, the landlord may have been guilty of trespass in stripping the premises. *Peterson v. Smart*, 70 Mo. 34. In *Johnson v. Dixon*, 1 Daly, 278; *Eagle v. Swayze*, 2 *id.* 140, the landlord was held for injuries to tenant from non-repair, but these cases

unless there was misrepresentation, active concealment,¹ or, perhaps, total inability on the tenant's part to discover the defect before entry.² And the subtenant, servant, employee, or even customer of the lessee, is under the same restriction; because entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk.³ Where, however, the landlord retains

are not law, §§ 327 *et seq.*, *post*, and *Johnson v. Dixon* is overruled. *Arnold v. Clark*, 45 N. Y. S. C. 252. In *Scheerer v. Dickson*, 3 Brewst. 276, the lessor's liability depended on custom.

¹ *Miner v. Sharon*, 112 Mass. 477, where the lessor did not disclose that the premises were infected with small-pox. So *Wilson v. Finch Hatton*, 2 L. R. Exch. 236, where the condition of the drains was not fairly stated by the lessor. See also *Scott v. Simons*, 54 N. H. 426; *Booth v. Merriam*, 155 Mass. 521. The concealment by a landlord from a tenant of the polluted condition of the water in a well belonging to the leased premises, after his discovery of the cause, which he failed to remove, and which existed at the time of the leasing will render him liable for all resulting damages, and will amount to an eviction. *Maywood v. Logan*, 78 Mich. 135, and see *Kern v. Myll*, 80 Mich. 525. *Gately v. Campbell*, 124 Cal. 520. In the absence of fraud, misrepresentation or deceit, a landlord is not responsible for injuries happening to his tenant by reason of a snow-slide or avalanche; the leased premises being particularly exposed to such dangers. *Doyle v. Union Pacific R'way*, 147 U. S. 413. In such cases, it is said that, in order to charge the landlord, it is not enough that he knows the source of the danger, unless he also knows, or common experience shows, that it is dangerous. *Cutter v. Hamlen*, 147 Mass. 471, and see *Martin v. Richards*, 155 Mass. 381.

² *Eakin v. Brown*, 1 E. D. Smith, 86; *Wilson v. Finch Hatton*, *supra*. See *Bowe v. Hunkin*, 135 Mass. 380; *Cutter v. Hamlen*, 147 Mass. 471; *Stevens v. Pierce*, 151 Mass. 207, where the doctrine of *caveat emptor* is applied as against a tenant entering with opportunity of examining the condition of the leased premises. See § 175 *b*, *post*.

³ *O'Brien v. Capwell*, 59 Barb. 497; *Robbins v. Jones*, 15 C. B. N. s. 221; *Nelson v. Liv. Brew.*, 2 L. R. C. P. Div. 811. In *Stratton v. Staples*, 59 Me. 94, the defective construction was not on the demised premises; and in *Scott v. Simons*, *supra*, the rule is limited to concealment or overt use by the landlord of the part retained. See *Alston v. Grant*, *infra*. In *Jaffe v. Hartean*, 56 N. Y. 398, the landlord was held not liable to tenant's servant for a defective boiler. Where the statute imposed an absolute duty on the landlord, as, to provide suitable means of escape from the premises in case of fire, it was held (upon the general principle that where the statute imposes a duty, any person having an interest in the performance thereof may sue for a breach causing him injury) that a

possession or control of any part of the tenement, the remainder of which is under the demise, while his duty to third persons is complete,¹ his liability to the tenant depends on the extent of his possession and control.² [Thus a landlord of rooms in a building leased to different tenants is bound to use reasonable care to keep the common staircase in repair, and, failing to do so, he is liable for injuries resulting to one of the tenants by reason of defects in the staircase.³ And so if the roof of a tenement house is retained in the landlord's possession as a place to be used in common by his tenants for hanging clothes, and for other uses to which the yard of a dwelling house is commonly put, it is his duty to keep it in a reasonably safe condition for such uses; and he owes it to a tenant's boarder, who, at the tenant's request, goes upon the roof to do gratuitously work which he had a right to do there, the same duty which he owes to the tenant.⁴ In the case of defects

tenant in occupation might sue for damage occasioned him by the absence of such suitable means; and further, that his occupancy of the premises, after discovering the absence of such means, for a reasonable time in which to notify the landlord of such absence would not deprive him of his remedy. *Willy v. Mulledy*, 78 N. Y. 310.

¹ *Kirby v. Boylst. Mkt.*, 14 Gray, 249; *Shipley v. Fifty Assoc.*, 101 Mass. 251; 106 *id.* 294; *Centre v. Davis*, 39 Ga. 310, where the lessor was held under the statutory requirement to keep in repair. But if he retains no portion of the premises, his responsibility ceases. *Leonard v. Storer*, 115 Mass. 86.

² *Tenant v. Goldwin*, 2 Ld. Ray. 1019; *Priest v. Nichols*, 116 Mass. 401.

³ *Looney v. McLean*, 129 Mass. 33; *Donohue v. Kendall*, 50 N. Y. S. C. 386; *Dollard v. Roberts*, 130 N. Y. 269; *Sawyer v. McGillicuddy*, 81 Me. 318. But see *contra*, *Purcell v. English*, 86 Ind. 34, where the decision rests on an application of the rule that there is no implied warranty of the fitness of premises for occupation. The landlord is not obliged to keep common halls and stairways lighted. *Gleason v. Boehm*, 58 N. J. L. 475.

⁴ *Wilcox v. Zane*, 167 Mass. 302. But where the owner of a building let to a tenant, who sublets a part of it, agrees to make the outside repairs, he is not liable to a member of the subtenant's family for injuries caused by a want of repair in an outside stairway, if he has had no notice of such want of repair. *Marley v. Wheelwright*, 172 Mass. 530. See *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472; *Hutchinson v. Cummings*, 156 Mass. 329; *Gerzebek v. Redmond*, 4 Vroom, 240.

in undemised premises, since the landlord is bound to due care, it is not necessary, in order to make him liable, that he should have actual knowledge of the defect if, by the exercise of due care, he would have known that it existed.¹ On the other hand, if the tenant has access to and means of remedying the defect, or had implied notice of it so that he took the risk of it when entering, he cannot hold the landlord responsible.² If however, the latter's overt act produces the injury, he will be answerable to the tenant as well as to a stranger,³ while for mere non-feasance no action lies.⁴ The landlord is moreover entitled to his insurance, notwithstanding the negligence of his tenant, if he used due care in his selection of an occupant.⁵

¹ *Lindsey v. Leighton*, 150 Mass. 285; *Leydecker v. Brintnall*, 158 Mass. 292. But the better opinion is that in cases where the landlord retains control of the premises the rule of no warranty does not apply. *Toole v. Beckett*, 67 Me. 544.

² *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Dunn v. Birm. Coal Co.*, L. R. 7 Q. B. 244; *Robbins v. Mount*, 4 Rob. (N. Y.) 553; *Taylor v. Bailey*, 74 Ill. 178; *Woods v. Naumkeag Steam Cot. Co.*, 134 Mass. 357, where the rule was applied as against one of several tenants, who had been injured by falling on ice accumulated upon a common stairway, through the alleged improper construction of such stairway; the defect having existed before the beginning of the tenancy. So in *Ross v. Fedden*, L. R. 7 Q. B. 661, an upper tenant was held not liable to a lower tenant for injury from a structural defect existing when the latter entered, and not chargeable to negligence on the part of the former. But where the injury results from the negligence of the upper tenant he is responsible therefor. *White v. Montgomery*, 58 Ga. 204. See *Freidenburg v. Jones*, 63 *id.* 612; *Jones v. Freidenburg*, 66 *id.* 505; *Quinn v. Perham*, 151 Mass. 162. In *Fera v. Child*, 115 Mass. 32, the tenant expressly took all risks. *Marshall v. Cohen*, 44 Ga. 489, turned on a statute requirement.

³ *Elliott v. Pray*, 10 Allen, 378; *Watkins v. Goodall*, 138 Mass. 533; *Kimmell v. Burfeind*, 2 Daly, 155; *Worthington v. Parker*, 11 *id.* 545; *Alston v. Grant*, 3 Ellis & B. 128; *Totten v. Phillips*, 52 N. Y. 254; *Alger v. Kennedy*, 49 *id.* 109.

⁴ *Pomfret v. Ricroft*, 1 Saund. 323; *Tenant v. Goldwin*, *Doupe v. Genin*, *supra*; *Chauntler v. Robinson*, 4 Exch. 163; *Krueger v. Ferrant*, 29 Minn. 385.

⁵ *White v. M. I. Co.*, 8 Gray, 566. But see *Stinemetz v. Ins. Co.*, 6 Phila. 21.

[175 *b*. **Application of the Rule of Caveat Emptor.** — As a result of the principles already stated,¹ the later cases hold that the common-law rule of *caveat emptor*, in the absence of any covenant or statutory provision abrogating it, governs the rights of the lessee in the leasing of property as well as those of a vendee in the sale of a chattel; that is, the lessee takes the leased property for better or for worse in the actual condition in which he finds it when he has had an opportunity to inspect the premises, whether or not he avails himself of it, and there has been no fraud or concealment on the part of the lessor, as to the condition of the property.² It follows that the lessor is not responsible for the existence of concealed defects, or dangers, of which he was unaware, and could not detect by a careful inspection. Where, however, there are concealed defects which may be dangerous to the occupant and which a careful examination by the lessee would not detect, which defects are known to the lessor, the latter is bound to reveal them to the lessee. It is said that while the failure to reveal such defects, or dangers, may not be actual fraud or misrepresentation, it is such negligence as may render the lessor liable for any injury resulting to the lessee from such defects or dangers.³ And upon the discovery of such defects or dangers as render the premises untenable it is generally held that the tenant will be justified in abandoning them.⁴ In the absence of warranty

¹ §§ 175, 175 *a*, *ante*, and see *Hart v. Windsor*, 12 M. & W. 68, as cited § 382, *post*, note.

² *Hill v. Woodman*, 14 Me. 38; *Gregor v. Cady*, 82 *id.* 131; *Whitmore v. Pulp Co.*, 91 *id.* 387; *Bowe v. Hunking*, 135 Mass. 380; *Franklin v. Brown*, 118 N. Y. 110; *Daley v. Quick*, 99 Cal. 179; *Toner v. Meussdorfer*, 123 *id.* 755; *Gallagher v. Button*, 73 Conn. 172; *Towne v. Thompson*, 68 N. H. 317; *Buckley v. Cunningham*, 103 Ala. 449.

³ *Cowen v. Sunderland*, 145 Mass. 363; *Anderson v. Hayes*, 101 Wis. 538; *Shackford v. Coffin*, 95 Me. 69; *McKenzie v. Cheetham*, 83 *id.* 543; *Sunasack v. Morey*, 196 Ill. 569; *Perez v. Ribaud*, 76 Tex. 191; *Davidson v. Fischer*, 11 Col. 583; *Blake v. Dick*, 15 Mont. 336; *Hines v. Willcox*, 96 Tenn. 148.

⁴ *Leonard v. Armstrong*, 76 Mich. 577; *Daly v. Wise*, 132 N. Y. 306; *Dennison v. Grove*, 52 N. J. L. 144. The lessee is not compelled to rescind the lease, but in an action against him for the rent may set off his damages resulting from the plaintiff's fraudulent representation. *Ibid.*

or covenant to repair, a lessor is not liable for injuries resulting to a lessee from the act of an agent in withholding information as to the defective condition of the premises, unless there is such a concealment of defects not open to ordinary observation as to amount to fraud or deceit.¹

SECTION II.

ON THE PART OF THE TENANT.

§ 176. **Nature of his Interest. — When it attaches. — Right of Possession.** — The rights, as well as the liabilities, of a tenant for life attach upon the execution and delivery of the lease or on the vesting of the estate; but, in case of a lease for years, they commence from the making of the contract. Before a tenant for years enters into possession, he acquires an interest in the term, whether the lease is to commence at once or on a future day.² This interest is assignable [in the absence of a covenant against assignment], and, in case of the death of the lessee before taking possession, will pass to his executors or administrators. If, however, a person entitled to an estate for years enters and is put out of possession, he cannot afterwards assign his term to a stranger;

¹ *Cate v. Blodgett*, 70 N. H. 317; *Hines v. Willcox*, 96 Tenn. 148; *Schmalzried v. White*, 97 *id.* 36. The rules stated in the text apply as against any one rightfully occupying under the lessee for an injury caused by the leased premises getting out of repair during the term. And this is so although the premises are let to several tenants and the injury is caused by want of repair in a common passageway. *Cole v. McKey*, 66 Wis. 500; *Fellows v. Gilhuber*, 82 *id.* 639; *Dowling v. Nuebling*, 97 *id.* 350. The representations of an agent as to the condition of leased premises of which he had the exclusive care are not binding upon his principal unless they made a part of the *res gestæ* of the transaction. *Cate v. Blodgett*, *supra*. While, in the absence of express covenant, a lessor does not undertake that the premises shall remain free from infectious diseases during the term; the maxim *caveat emptor* has no application when the disease does not exist at the time the lease is made. *Edwards v. McLean*, 122 N. Y. 302.

² *Whitney v. Allaire*, 1 N. Y. 305.

for, although by his entry the estate for years became vested, yet being afterwards defeated by the entry of a stranger, the lessee has a right of entry only left to him, which the policy of the law will not suffer him to transfer because it is a mere right of action.¹ His right of possession becomes complete on the day fixed by the agreement for the commencement of the term; and he will then be entitled to the possession of the premises in the same condition in which they were on the day of the demise. That he has agreed to make alterations or repairs upon the premises in the mean time and failed in performance, is not a condition precedent to the vesting of his estate.² And one who has agreed for a lease must take the premises as they stand, and cannot require the lessor to put them in better condition, or make them more comfortable, independently of an agreement to that effect.³ If possession is withheld, he may maintain an action of ejectment against any person, even the lessor, who wrongfully withholds it;⁴ or, if possession is withheld by the lessor, or one under his authority, he may, at his option, repudiate the contract, or bring an action for damages against the landlord for a breach of his agreement.⁵ He may also repudiate, if he has been

¹ *Bruerton v. Rainsford*, Cro. El. 15; *Saffyn's Case*, 5 Co. 124, a; 2 Roll. Abr. 850. In Delaware, an incoming tenant was held to be entitled, from custom and necessity, to enter before his term commenced for the purpose of filling the ice-house on the premises. *State v. McClay*, 1 Harringt. 520.

² *Lowell Meeting-House v. Hilton*, 11 Gray, 407.

³ *Chappel v. Gregory*, 34 Beav. 250. And see *post*, §§ 327 *et seq.*; 382.

⁴ *Remington v. Casey*, 78 Ill. 317; *Ollendorff v. Cook*, 1 Lans. 37.

⁵ *Trull v. Granger*, 9 N. Y. 115; *Spencer v. Burton*, 5 Blackf. 57; *Clark v. Butt*, 26 Ind. 236. The English cases go further, and hold lessor liable to the lessee if possession is withheld by a stranger, considering the lessor bound to deliver "possession, and not merely the chance of a lawsuit." *Doe v. Clay*, 5 Bing. 440; *Jenks v. Edwards*, 11 Exch. 775. So in Missouri, *L'Hussier v. Zallee*, 24 Mo. 13; *Hughes v. Wood*, 50 *id.* 850. But most of the American courts do not hold lessor to this liability. *Gardner v. Keteltas*, 3 Hill, 330; *Becker v. Forest*, 1 Sweeny, 528; *Gozzolo v. Chambers*, 78 Ill. 75; *Pendergast v. Young*, 1 Fost. 234; *Cozens v. Stevenson*, 5 S. & R. 424; § 312, *post*. If, before the day named for taking possession, the lessor wrongfully removes a fixture, so as to render the dwelling unfit for habitation, the lessee may refuse to take possession. *Cleves v. Willoughby*, 7 Hill, 88.

defrauded in the negotiation for the lease; but he cannot avoid the lease on the ground of the lessor's misrepresentations, if he does not rescind at once on discovering the fraud; nor so long as he retains possession.¹ His term of years is liable to be sold under an execution against him, like any other chattel; although the judgment will not be a lien upon it, either at common law or by statute.² He becomes responsible for rent and upon all his other covenants in the lease from the time the term commences, although he should refuse to take possession of the property³ [and, under a lease to two tenants, the occupation of one is sufficient to make both liable for the rent⁴]. If another person enters into possession by the tenant's consent, he will be considered, in respect to the landlord's rights, as substituted in the tenant's place, although he may disclaim privity with the tenant.⁵

§ 177. **Measure of Tenant's Damages as against Landlord.** — The measure of the damages which the lessee may recover from the lessor for the wrongful withholding of possession is the difference between the rent reserved in the lease, and the actual value of the lease to him⁶ [but he cannot recover for a

¹ *McCarty v. Ely*, 4 E. D. Smith, 375; *Milliken v. Thorndike*, 103 Mass. 382; *Hall v. Ryder*, 152 Mass. 528.

² *Wilson, Ex parte*, 7 Hill, 150; and see *People v. Westervelt*, 17 Wend. 674; s. c. 20 *id.* 416; § 14, *ante*, note.

³ *Birkhead v. Cummins*, 85 N. J. 44; *Becar v. Flues*, 64 N. Y. 518; *Bellasis v. Burbriche*, 1 Ld. Ray. 170; s. c. Holt, 199; and see *Eaton v. Jaques*, Doug. 461.

⁴ *Kendall v. Carland*, 5 Cush. 74.

⁵ *Howard v. Ellis*, 4 Sandf. 369. If a tenant permits a third person to occupy the premises, it is equivalent to his own personal occupation, unless the landlord accepts the new occupant as tenant in place of the former one. *Bacon v. Brown*, 9 Conn. 838. It is not essential to a valid lease that the building which is the subject of the contract should be erected at the time the lease is made, or that the lessor be the owner of the ground upon which the building is to be placed. *Haven v. Wakefield*, 89 Ill. 509.

⁶ *Trull v. Granger, supra*; *Townsend v. Wharf. Co.*, 117 Mass. 501; *Hughes v. Wood*, 50 Mo. 350. In *Hexter v. Knox*, 42 N. Y. S. C. 8; 68 N. Y. 561, one who had hired a hotel and procured furniture was allowed to recover as for a furnished house. Nor can the damages be abated by

special use to which he would have put the demised premises unless this was known to the lessor.¹ He may recover his costs, and expenses necessarily incurred². If the landlord cannot put the lessee into possession of all the land he contracted to give, or of the building which forms the principal inducement to the contract, the latter is under no obligation to accept the residue, and will be justified in abandoning the entire premises.³ Yet if he prefers to occupy them, but does not obtain possession of all he hired, he is liable for rent on a *quantum meruit*, for the part occupied.⁴ And though the lease may have been delivered after signing to the party interested, with a stipulation that such delivery shall be subject to the landlord's being satisfied with the reference as to the responsibility given him by the tenant, it is a question of fact, in an action for the non-performance of the agreement, whether, inquiry having been made, the answer given by the party referred to was such as reasonably satisfied the condition, the landlord having declared it was not satisfactory to him, and on that ground refused to let the tenant into possession. In such an action, the plaintiff may

the value of any other occupation the lessee could have engaged in during the term. *Wolff v. Studebaker*, 65 Pa. St. 459.

¹ *Wolff v. Studebaker*, *supra*.

² *Stedding v. Newell*, L. R. 4 C. P. 212; *Green v. Williams*, 45 Ill. 206.

³ *Tunis v. Grandy*, 22 Gratt. 109. So if he has given a note for rent in advance, he may defeat payment. *Andrews v. Woodcock*, 14 Iowa, 397. A dwelling-house and premises were demised for a year; and the lessee accepted the lease, and entered upon the premises. Before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not enter upon them. Held, that the demise was void. *Neale v. Mackenzie*, 1 M. & W. 747. Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole is void. *Doe v. Lloyd*, 3 Esp. 78.

⁴ *Hay v. Cumberland*, 25 Barb. 594; *Hurlburt v. Post*, 1 Bosw. 28; *Lawrence v. French*, 25 Wend. 443. Under a lease for years, the destruction of the building by fire before the commencement of the term entitles the lessee to have the lease cancelled; for, until the term commences, the contract is purely executory, and possession is a condition precedent to any liability for rent. *Wood v. Hubbell*, 5 Barb. 601; s. c. 10 N. Y. 479.

give evidence of any particular loss sustained by the breach of the agreement if he has sufficiently averred it in his declaration.¹

§ 178. **Rights incident to Tenant's Possession.** — **May defend it.** — **Liable for Waste, etc.** — Upon taking possession, the tenant is invested with all the rights incident to possession and to the use of all the privileges and easements appurtenant to the tenement, and may take such reasonable estovers and emblements as are attached to the estate, unless restrained by special agreement.² He may maintain an action against any person who disturbs his possession, or trespasses upon the premises, though it be the landlord himself,³ who has, in general, no right to enter and repair, unless by virtue of a stipulation to that effect; or unless the repairs are necessary to prevent waste.⁴ If a stranger enters and commits waste, the tenant will nevertheless be liable for such waste at the suit of his landlord, and will be left to his remedy over against the stranger [against whom he may maintain an

¹ *Ward v. Smith*, 11 Price, 19; *Coe v. Clay*, 5 Bing. 440.

² It is held in Indiana that there may be a valid parol reservation of the landlord's share of growing crops from a written lease, by the terms of which the lessee is to take possession before the maturity of the crop. The same rule is held in that State upon the conveyance of the fee by deed. *Hisey v. Troutman*, 84 Ind. 115.

³ *Dickinson v. Goodspeed*, 8 Cush. 119.

⁴ *Leader v. Moxon*, 2 W. Bl. 924; *Bedingfield v. Onslow*, 8 Lev. 209; *Shadwell v. Hutchinson*, 2 B. & Ad. 97; *Barker v. Barker*, 8 C. & P. 557; *Harrison v. Blackburn*, 17 C. B. n. s. 678; even under a parol lease, *Wilber v. Paine*, 4 Ohio, 251. A person who took possession from one who falsely claimed to have an oral lease from the owner is, after remaining in for some time with the apparent acquiescence of the owner, to be deemed rightfully in possession until his tenancy is properly terminated, by notice or otherwise. The owner may not forcibly eject him, nor will he be justified in closing up the entrance to the premises, or in refusing to allow the tenant to remove his goods. And in an action for damages in such a case, the owner will be held liable for the value of the goods detained, as well as for the injury done by breaking up the business of the tenant. *Marquart v. LaFarge*, 5 Duer, 559. A railroad company entering and constructing its road on the leased premises under the landlord's authority only is a trespasser on the tenant. *Crowell v. Railroad Co.*, 61 Miss. 631.

action of trespass *quare clausum*,¹ since the tenant and landlord may each maintain an action for the injury to his particular estate²]. And, after the term has expired, he may still recover damages for an injury sustained during its continuance.³ As occupant, he is *prima facie* liable to answer for any neglect in the repair of fences, or party-walls, or for any improper use of the premises or the fixtures thereon; it being sufficient, except where a statute has otherwise provided, to charge a man for such repairs or damages by the name of occupant.⁴ [The occupant, and not the owner, is bound to repair drains and sewers; hence, in a suit by an adjoining owner for non-repair thereof, the declaration must allege occupation by the defendant.⁵ Where a town was compelled to pay damages for a defective sidewalk, attached to premises in the possession of a tenant, the tenant was held liable to

¹ Cook v. Champl. Tr. Co., 1 Dem. 91; Wood v. Griffin, 46 N. H. 231; Cal. Dry Dock Co. v. Armstrong, 8 Sawyer, 523; Attersoll v. Stevens, 1 Taunt. 198.

² Hayward v. Sedgley, 14 Me. 439; Austin v. Huds. Riv. R. R., 25 N. Y. 334; Bannon v. Mitchell, 6 Bradw. (Ill.) 17. And it is held that the landlord and tenant from year to year may unite in such an action, and the jury apportion the damages as between the plaintiffs. Getz v. Phil. & Read. R. R. Co., 105 Pa. St. 547, and that where a railroad company had the right of way over mining lands, and covenanted with the owner of the land that, upon notice, it would change its location, or permit the coal under the way to be mined, that a tenant of the owner, who under his lease had a right to mine all the coal in the land, might sue in the name of the landlord for breach of the covenant; and that damages, to be measured by the value of the coal left standing by reason of the way, might be so apportioned. Mine Hill R. R. Co. v. Lippincott, 86 id. 468, Sharswood & Paxon, JJ., dissenting.

³ 2 Roll. Abr. 551; Symonds v. Seabourne, Cro. Car. 325; Bedingfield v. Onslow, *supra*; Holt, N. P. C. 543. It seems that, at common law, when premises burglariously entered are in possession of the tenant, such premises are to be alleged in the indictment to be the tenant's property. McGrillis v. State, 69 Ind. 159. But by statute in Indiana, R. S. 1881, § 1753, such premises may properly be charged to be the property either of the landlord or the tenant. Kennedy v. State, 81 id. 379.

⁴ Althorf v. Wolfe, 22 N. Y. 355; Chicago v. Brennan, 65 Ill. 160; Regina v. Bucknall, 2 Ld. Ray. 792; Rider v. Smith, 3 T. R. 766; Cheetam v. Hampson, 4 id. 318. And see § 175, *ante*.

⁵ Russell v. Shenton, 3 Q. B. 449.

reimburse the town for such payment.¹] The tenant is liable for all injuries produced by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them.² [Thus if a house on the highway be ruinous and likely to fall, it is a nuisance, and the occupant, although but a tenant at will, is bound to repair it; for, as the danger is the matter that concerns the public, the public is to look to the occupant and not to the estate.³] The tenant is liable for not properly covering an old shaft of a mine, whereby the plaintiff's horse fell down and was killed;⁴ for not properly covering a coal-hole, cellar-entrance, sewer, or railing of an area opening into the highway, allowing a sink to overflow to the injury of his neighbor, or the like.⁵ He is responsible for improper use of water-pipes; and for an overflow caused either by a neglect to turn off the water, or by such a misuse of the works as deprives them of power to stop the flow of water.⁶ And that the premises were in the same unsatisfactory condition before the defendant came into possession is not a defence;⁷ for the occupant who continues a nuisance is as liable as the one who created it.⁸

§ 179. Must preserve Boundaries. — Enlargements presumed to follow the Reversion. — Public Burdens. — The tenant must

¹ *Lowell v. Spaulding*, 4 Cush. 277.

² *Marriott v. Stanley*, 1 M. & G. 568.

³ *Regina v. Watts*, 1 Salk. 357; *Odell v. Solomon*, 50 N. Y. S. C. 119.

⁴ *Sybray v. White*, 1 M. & W. 435.

⁵ *Payne v. Rogers*, 2 H. Bl. 349; *Leslie v. Pounds*, 4 Taunt. 649; *Laugher v. Pointer*, 5 B. & C. 559; *Mayor v. Corlies*, 2 Sandf. 301; *Stickney v. Monroe*, 44 Maine, 195; *Pickard v. Collins*, 23 Barb. 444; and see § 175, *ante*.

⁶ *Warren v. Kauffman*, 2 Phila. 259; *Weston v. Incorp. of Tailors*, Hay, 66; 14 F. C. 1232; *Moore v. Goedel*, 84 N. Y. 527; *Killion v. Power*, 51 Pa. St. 429. Where a water-closet in the upper part of a house overflowed in consequence of the valve being out of order, and there was no evidence of negligence in using the water-closet, or that the occupant knew the valve was out of order; it was held that he was not liable for the damage. *Ross v. Fedden*, L. R. 7 Q. B. 661.

⁷ *Coupland v. Hardingham*, 3 Camp. 398; *Anderson v. Dickie*, 1 Rob. (N. Y.) 238; *Healey v. Mayor*, 3 Hun, 708.

⁸ § 175, *ante*.

preserve the boundaries of the land demised ; for if he permits them to be destroyed so that the lessor's premises cannot be distinguished from his own, he must restore the land specifically or yield up other land of equal value.¹ If he encloses land, adjacent to or in the vicinity of the demised premises, whether such land be part of the waste or of the highway, or belong to the landlord or to a third person, the presumption at the end of the term is, that the enclosure is part of the holding and was made for the benefit of the landlord.² And this presumption is not rebutted by the fact that the land taken in by the encroachment is separated by a brook from that which the tenant occupies : for to fall within the rule it need not be immediately adjacent ; it is sufficient that it be near.³ [But this presumption does not seem to prevail for the landlord's benefit as against third persons ;⁴ or if the tenant during the term does some act disclaiming his landlord's title ;⁵ or if he has been in possession of such land previous to his taking a lease of the adjoining land ;⁶ and a fence fronting on a highway for twenty years is not to be taken as the true boundary thereof, if the original boundary can be made certain by ancient monuments, although these are not now in existence.⁷] The tenant is bound to the performance of such duties as the ordinances of any city or town may from time to time impose upon him or the premises in his occupation, by virtue of his residence within the boundaries of such incorporation.⁸

§ 179 *a*. **Liabilities to Cotenant.** — A tenant will be liable to an action for obstructing or disturbing his cotenant in the use

¹ *Att'y-General v. Fullerton*, 2 Ves. & B. 263; *Willis v. Parkinson*, 1 Swanst. 9.

² *Andrews v. Hales*, 2 Ellis & B. 349. So where he acquires a private right of way. *Dempsey v. Kip*, 61 N. Y. 462.

³ *Lisburne v. Davies*, L. R. 1 P. C. 259; *Kingsmill v. Millard*, 11 Exch. 313.

⁴ *Doe v. Massey*, 17 Q. B. 573.

⁵ *Kingsmill v. Millard*, 11 Exch. 313.

⁶ *Dixon v. Bates*, L. R. 1 Exch. 259.

⁷ *Wood v. Quincy*, 11 Cush. 487.

⁸ *Rex v. St. Luke's Hosp.*, 2 Burr. 1053; *Milward v. Caffin*, 2 W. Bl. 1330.

of the premises:¹ and he has no right to make improvements and charge his cotenant with a proportion of the expense, without the consent of the cotenant, express or implied; although he may make such repairs as are necessary to preserve the property from waste, at the expense of all the joint owners, without their consent.² He may purchase an outstanding or adverse claim to the common property, but equity will not permit him to acquire such a title, and hold it for his own benefit to the exclusion of the others;³ whether he purchases in his own name, or procures another person to purchase for him.⁴ This rule may be modified by circumstances when its strict application would be inequitable.⁵ But the other cotenant must exercise reasonable diligence in making his election to participate in the benefit of the purchase; and unless he makes such election, and contributes or offers to contribute his proportion of the purchase-money actually paid, he will be deemed to have repudiated the transaction.⁶ Nor can he maintain an action against his cotenant in trespass for an entry upon the land, or for damages sustained by a neglect to repair, without a previous request by the plaintiff to join in making such repairs.⁷

¹ *Keay v. Goodwin*, 16 Mass. 3; *Newton v. Newton*, 17 Pick. 201.

² *Calvert v. Aldrich*, 99 Mass. 74; *Taylor v. Baldwin*, 10 Barb. 626; *Loring v. Bacon*, 4 Mass. 575; *Converse v. Ferre*, 11 *id.* 325; *Mumford v. Brown*, 6 Cow. 475; *Coffin v. Heath*, 6 Met. 80; §§ 114-117, *ante*.

³ *Burhans v. Van Zandt*, 7 N. Y. 528; *Van Horn v. Fonda*, 5 Johns. Ch. 388.

⁴ *Dubois v. Campan*, 24 Mich. 360; *Duff v. Wilson*, 72 Pa. St. 442.

⁵ *Buchanan v. King*, 22 Gratt. 14; *Freutz v. Klotch*, 28 Wis. 312.

⁶ *Mandeville v. Solomon*, 39 Cal. 125, 133.

⁷ *Van Orman v. Phelps*, 9 Barb. 500; *Moody v. Buck*, 1 Sandf. 304; *Doane v. Badger*, 12 Mass. 95; nor to recover documents relating to the joint estate, although an action of waste, or an injunction to stay waste, will lie as between joint tenants or tenants in common: *Hawley v. Clowes*, 2 Johns. Ch. 122; *s. c.* 12 Johns. 484; 2 N. Y. R. S. 334, § 3; *Smallman v. Onion*, 3 Bro. Ch. 621; *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 *id.* 128. Persons who occupy the same building, and have each the privilege of using the water-pipes, can only be held responsible for damages resulting from their negligent use or care, on proof of negligence on their part; and neither is responsible for the negligence of the others; though they may be jointly liable if their obligations under the lease are joint. *Moore v. Goedel*, 7 Bosw. 591. As to the respective rights of co-

§ 180. **Not to deny Landlord's Title, nor attorn to Stranger.**—The tenant must regard the interest of his landlord, with respect to possession, and not only maintain fealty himself but give due notice of any attempt made to dispossess him. His possession is always considered the possession of the lessor, and he is not permitted to deny the title under which he entered.¹ A tenant in possession under one title can make no valid attornment to one not in privity with that title.² And if a tenant should acquiesce in the wrongful act of a stranger, this will not bind the landlord when he regains possession; as, if he suffers windows, newly opened by his neighbor, to remain unobstructed for more than twenty years, and so to become ancient lights, the landlord, at the expiration of the term, will not be bound thereby, but may shut up the lights, or treat them as if they had been newly opened.³ [It is held that the relation of landlord and tenant is so far confidential as to render it inequitable for a tenant, who is also a lien creditor to issue execution and buy in the property at a sheriff's sale without notice to the landlord, and the land-

tenants in a business block to the use of hoisting apparatus in the building, see *Browning v. Dalesme*, 8 Sandf. 18. When the lessee in possession has, under the lease, the right to erect and maintain signs in front of a part of the property, the lessee of another part of the same building will be restrained by injunction from impairing such right. Both the landlord and those claiming under him are estopped from acts which defeat the right. *Snyder v. Hersberg*, 11 Phila. 200.

¹ The statute in New York requires the tenant to whom notice of ejectment, or any other process, to recover the land occupied by him, or the possession thereof, shall be delivered, forthwith to give notice thereof to his landlord, under the penalty of forfeiting three years' rent. 1 R. S. 748, § 27. Under this statute it was held that a landlord, or other person, who is entitled by statute to be substituted in the place of, or joined with, the defendant in an action of ejectment, who, without causing himself to be made a party, defends such suit unsuccessfully, in the name of the original defendant, will be ordered to pay the costs of the plaintiff, on motion, after execution against the defendant of record has been returned unsatisfied. *Farmers' L. & T. Co. v. Kursch*, 5 N. Y. 558.

² *Fuller v. Sweet*, 30 Mich. 237. So by statute in Mississippi, *Tucker v. Whitehead*, 28 Miss. 762; *McNamee v. Relf*, 52 *id.* 426. See to the general rule, *Johnson v. Futch*, 57 Miss. 73; *Bryant v. Winburn*, 43 Ark. 28; *Marsan v. French*, 61 Tex. 173.

³ *Jesser v. Gifford*, 4 Burr. 2141; *Daniel v. North*, 11 East, 372.

lord, upon payment, may attack a title so obtained.¹ But where the landlord by his own act acknowledges the title of another, he is estopped to enforce a claim for rent against a tenant who, relying on such acts, has paid rent to the other party.² And where the lessor is one of two claimants to land, his lessee in possession and paying rent to him, cannot be held liable for rent to the other claimant, since he could not have resisted suit brought by his lessor to recover such rent.³

§ 181. **To be compensated for Injury done for Public Benefit.** — At common law any person, in case of actual necessity and to prevent the spread of fire, might level a building in a block or street, without being liable in trespass or otherwise; and the owner or occupant had no legal redress for any injury he might thus sustain, against the individual who did the act.⁴

¹ *Matthews' Appeal*, 104 Pa. St. 444. See *Lansman v. Drahos*, 10 Neb. 172; § 785, *post*.

² *Winterink v. Maynard*, 47 Iowa, 366.

³ *Keith v. Paulk*, 55 Iowa, 260. As to an attornment to a mortgagee, see *Jones v. Clark*, 20 Johns. 51; *Magill v. Hinsdale*, 6 Conn. 464; *Smith v. Shepard*, 18 Pick. 147. By statute in Iowa an attornment is void unless to a mortgagee "after the mortgage has been forfeited," these words being construed to mean after the mortgage has been foreclosed, and the period for redemption expired, the mortgagor being entitled to redemption. *Mills v. Hamilton*, 49 Iowa, 105. By 1 R. S. 744 (N.Y.), § 3, the attornment of a tenant to a stranger is void; and will not affect the possession of his landlord, unless it be made, — 1. With the consent of the landlord; 2. Pursuant to or in consequence of a judgment at law, or the order of a court of equity; or, 3. To a mortgagee after the mortgage has become forfeited. An attornment to one having right to evict, is not wrong or improper. *Smith v. Coker*, 110 Ga. 653. See §§ 706–708, *post*.

⁴ *Republica v. Sparhawk*, 1 Dall. 357; 2 Kent, Com. 338; *White v. City Council*, 2 Hill (S. C.), 571. In the *Saltpetre* case, 12 Co. 13, it was held "that for the commonwealth, a man shall suffer damage; as, for saving a city or a town, his house shall be plucked down, if the next be on fire; and a thing for the commonwealth every man may do without being liable to an action." And the same rule was held in *Mouse's Case*, *id.* 63, which was trespass against a passenger in a barge, for throwing out the goods of the plaintiff in a storm; it being held that, in case of necessity, and to save the lives of the passengers, it was lawful. See also *Dyer*, 86.

But the injured party was held to be entitled to compensation from the public.¹ The Constitution of the United States affirms the common-law principle, and provides that private property shall in no case be taken for public use, without compensation.² The application of this principle extends not only to the rights of the owner of the building but to the protection of the tenant's interest also, he being entitled to recover damages from the public, not only for his interest in the building but also for the property belonging to him which was in, and destroyed with the building. This was so held in a case in which the court recognized the principle that, in case of necessity, and to prevent the spread of fire, the ravages of pestilence, or other great public calamity, the private property of an individual may be taken and destroyed for the good of the many without subjecting those whose duty it is to protect the public interests to personal liability for the damage which the owner thereby sustains; but that in all such cases, as well as in the event of a building being destroyed by a mob, the public, or the city within whose bounds such destruction happens, are liable to make good all damages which either landlord or tenant may suffer.³ But no damages are recoverable if the building, or the property therein, would have been inevitably destroyed by the flames if it had not been pulled down; or if it was on fire, and beyond the hope of extinguishment, when the order of the magistrate to demolish it was given.⁴ [Where the provisions in a lease for years gave

¹ Per Buller, J., *Governor v. Meredith*, 4 T. R. 797.

² Const. U. S. Amendments, art. 5. The legislatures of all the States have provided some mode of compensation for one whose property has been taken or destroyed for the public good.

³ *Mayor v. Lord*, 17 Wend. 285; s. c. 18 *id.* 126; *Same v. Pentz*, 24 *id.* 668. But owners of goods who have no estate or interest in the building destroyed have no claim to damages. *Stone v. Mayor*, 25 Wend. 157; *Russell v. Mayor*, 2 Den. 464. The fact that the owner is insured does not affect his right to compensation nor entitle the corporation to a deduction for the amount recoverable or which has been received upon the policy; the insurers being entitled to subrogation or to a reduction for the amount received by the owner. *Mayor v. Pentz*, *supra*.

⁴ See also *Pentz v. Ætna F. I. Co.*, 9 Paige, 568. A claimant must be able to show that the act of pulling down was unnecessary, in order to take the case out of the ordinary losses by fire. And if the buildings

the lessee rights not incident as of course to his tenancy, and imposed on him duties such as do not necessarily fall upon a lessee for years, it was held that such provisions were not modifications of the relation of the tenant and the reversioner so as to make their interests other than merely successive in point of time in a portion of the leased premises taken for public purposes under the right of eminent domain; and that, therefore, the damages for such taking were to be assessed and awarded in a gross sum, and were payable to a trustee for the parties appointed for that purpose.^{1]}

§ 182. **Liabilities to Third Persons. — For Nuisance. — To Under-tenants.** — [It follows, as the result of principles already stated,² that a tenant in full possession is bound, as between himself and third persons, to keep structures abutting upon highways in such repair that the highways may be safe for the use of travellers.³ And, generally, the tenant of a building who negligently permits it, or the access to it, to be in an unsafe condition, is liable for injuries thereby occasioned to third persons lawfully upon the premises.⁴ But a tenant for years is not generally responsible for the maintenance and repair of a structure erected upon the leased premises by the landlord before the beginning of the term; although such structure operates to the nuisance of such third person; the landlord, in such case, being liable.⁵ Since the owner of premises upon which a nuisance has been erected by his predecessor in title is responsible for such nuisance, it is held that one having possession of premises under a lease for nine hundred and ninety-nine years is, to all intents and purposes,

all around were on fire, and were afterwards destroyed; and, probably, the fire would have destroyed the building if it had not been blown up, it is a loss by fire within the meaning of a policy of insurance, and is payable by the insurer, and not by the city. *Corlies v. City F. I. Co.*, 21 Wend. 367.

¹ *Boston v. Robbins*, 126 Mass. 384.

² See §§ 175, 175 *a*, *ante*; § 192, *post*.

³ *Lee v. McLaughlin*, 86 Me. 410.

⁴ *Mellin v. Morrill*, 126 Mass. 545; *Abbott v. Jackson*, 84 Me. 449; *DeTarr v. Heim*, 62 Kan. 188.

⁵ *Meyer v. Starris*, 61 N. J. L. 83.

the owner; and his responsibility for the maintenance and repair of structures upon the premises, so far as these are a nuisance to third persons, is that of owner, and not of a tenant for years.¹] Where it is the business of the public to keep the premises in repair, neither landlord nor tenant will be responsible for the damages.² If a stranger, whose goods have been, or are about to be, distrained upon the tenant's premises, should, in order to redeem them, be obliged to pay the rent, he may recover it again from the tenant, as for money paid to his use.³ And the same rule applies where the goods of a lodger, or an under-tenant, have been so taken.⁴ But an under-tenant, whose goods have been sold under a distress warrant issued by the original landlord for rent due from his immediate tenant, cannot maintain an action *for money paid* to the use of the latter, because the money never was the under-tenant's; for, on the sale under the distress, the money paid by the purchaser immediately vested in the original landlord.⁵

SECTION III.

DIVISION FENCES AND PARTY-WALLS.

§ 183. *Tenant bound to maintain. — Common-law Rule. —* The tenant, by virtue of his occupation, is liable to third persons for the consequences of a neglect to keep up and repair division fences, party-walls, and highways; his liability in this respect being coextensive with that of the landlord.⁶ At common law no person was bound to fence his land against the cattle of another; and for any trespass they might commit their owner was answerable, whether they entered from his own close, the close of a third person, or from the highway.⁷

¹ *Meyer v. Starris, supra.*

² *Russell v. Men of Devon*, 2 T. R. 671.

³ *Sapsford v. Fletcher*, 4 T. R. 511.

⁴ *Exall v. Partridge*, 8 T. R. 308.

⁵ *Moore v. Pyrke*, 11 East, 52.

⁶ *Taylor v. Whitehead*, 2 Doug. 745; *St. Louis, V. & T. R. R. v. Washburn*, 97 Ill. 258; *Baynes v. Chastain*, 68 Ind. 376.

⁷ *Stafford v. Ingersol*, 8 Hill. 88; *Hilton v. Aukesson*, 27 L. T. N. S.

But as the settlement of lands progressed, an obligation to maintain fences gradually became the subject of statutory regulation. In some States the common-law rule does not seem to have been adopted, the owner of animals being under no obligation to fence them in, and they may wander over any unfenced land as if it were a common. The occupant of land must keep them out of his grounds at his peril, and is justified in driving them away from his unfenced land in any reasonable manner; but still, if they break through a sufficient fence, they are liable for damages consequent upon the trespass, as at common law.¹

§ 184. **Statutory Provisions.** — In New York it is provided that, when two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, and similar statutes exist in many of the States; some of them preventing a recovery against the owner of cattle breaking through an insufficient fence, and others empowering a landowner to repair, at the expense of an adjoining proprietor, fences which the latter neglects to repair.² Sometimes an exception is made in favor of the owner of land who prefers to let his land lie open; but this is a dangerous privilege, for the owner of domestic animals, being bound, at his peril, to restrain them from trespassing upon the lands of his neighbor, is not only precluded, if he

519. *Rust v. Low*, 6 Mass. 90; *Minor v. Deland*, 18 Pick. 266; *Thayer v. Arnold*, 4 Met. 589.

¹ *Cleveland R. Co. v. Elliott*, 4 Ohio, 474; *Waters v. Moss*, 12 Cal. 535; *Laws v. N. C. R. R. Co.*, 7 Jones (N. C.), 468; *N. Y. & Erie R. Co. v. Skinner*, 19 Pa. St. 801; *Herold v. Myers*, 20 Iowa, 378; *Stover v. Shugart*, 45 Ill. 76; *Larkin v. Taylor*, 5 Kans. 433; *McManus v. Finan*, 4 Iowa, 283. In New York, it is unlawful for cattle of any description to run at large in any public street, park, place, or highway. And the overseers of highways and street commissioners in incorporated villages are required to seize them wherever found, and enforce the penalty prescribed. Any private person may also seize any animal trespassing on land owned or occupied by him, or in the highway opposite his land. See *Avery v. Maxwell*, 4 N. H. 36; *Stackpole v. Healy*, 16 Mass. 33.

² *Myers v. Dodd*, 9 Ind. 290; *Chambers v. Mathews*, 8 Harrison, 368; *Holden v. Shattuck*, 34 Vt. 336; *Wills v. Walters*, 5 Bush, 351; *State v. Perry*, 64 N. C. 305; *Eames v. Patterson*, 8 Greenl. 81.

neglects so to do, from recovering damages for any injury they may sustain by going upon those lands, but is liable for any trespass they may commit, whether he knows of their vicious propensities or not.¹ [This subject was fully considered in Massachusetts, where Parsons, C. J., after stating the principle above stated, and that it might be otherwise by force of prescription, where such prescription exists, said: "If bound by prescription to fence his close, he was not bound to fence it against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was, nevertheless, bound to keep his cattle on his own ground, and prevent them from escaping. The legal obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no agreement has been made, rests entirely on statutory provisions, and trespass will lie against the owner of cattle entering on the grounds of another, though there be no fence to obstruct them, unless he can protect himself by statute, prescription, or agreement."²] Fences are designed to keep one's own cattle at home, and not to guard against the intrusion of those belonging to other people. But, whether fenced or not, an owner of land will not be justified in injuring domestic animals found trespassing thereon; and if he does so, he will be liable for the injury. He is entitled only to an action for the trespass or to impound the animals to procure satisfaction for the damage done by them; and this he may do at any time, unless their owner can protect himself by statute, written agreement with his neighbor, or prescription.³ In New York, the statute applies only to the rights and obligations of tenants of adjoining closes.⁴ The rights of persons having no interest in either close remain unaffected by it, and are to be defined by the common law. Consequently, the owner of an animal

¹ *Holladay v. Marsh*, 8 Wend. 142; *Little v. Lathrop*, 5 Greenl. 356; *Bush v. Brainard*, 1 Cow. 78; *Clark v. Brown*, 18 Wend. 221; *Beckwith v. Shordike*, 4 Burr. 2092; *Angus v. Radin*, 2 South. 815; *Dolph v. Fenis*, 7 W. & S. 367.

² *Rust v. Low*, 6 Mass. 90; *Little v. Lathrop*, 5 Greenl. 356.

³ *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Palmer v. Silverthorn*, 82 Pa. St. 65; *Rust v. Low*, 6 Mass. 90.

⁴ *Hewitt v. Watkins*, 11 Barb. 409.

which trespasses upon another's land, breaking through the fence between that land and the land of a third person, can recover no damages for any injury sustained by reason of a defective fence of the defendant.¹ It has been held that the statute does not extend to injuries sustained by the death of cattle caused by eating unripe corn when they are unlawfully in the field of the party who is in default for not keeping up his fence; nor is it intended to take away any previously existing common-law remedy for such damages as may have been sustained by the negligence or misconduct of a neighbor.²

§ 184 *a*. **Respective Duties of Parties.**—If disputes arise about the proportions of fence to be made by each proprietor, they must be settled by the fence-viewers [or other designated officers] of the place in which the lands are situated; and then, if either party continues to neglect his portion of the fence, after proper notice to repair, the other party may build a fence, at the expense of the party neglecting. The effect of the statute, requiring each of the owners of adjoining lands to maintain his proportion of the partition fence, after it has been divided, is to protect each from liability for any trespass committed upon the lands of the other, by reason of any defect in that part of the fence which the other was bound to keep up. If the cattle of the party whose portion of the fence is defective, trespass upon his neighbor in consequence thereof, the latter may have his damages appraised under the statute, instead of resorting to an action of trespass; but he is not bound to adopt this course, and may, if he prefers, still have his common-law remedy.³

¹ *Rust v. Low*, *supra*; *Lawrence v. Combs*, 31 N. H. 331. The statute applies only in favor of the owner of animals lawfully upon the adjoining premises. *Holladay v. Marsh*, 3 Wend. 142; *Lord v. Wormwood*, 29 Me. 288.

² *Stafford v. Ingersol*, 3 Hill, 88. The owner of a close is obliged to fence only against cattle lawfully on the adjoining land. *Melody v. Reab*, 4 Mass. 471; *Stackpole v. Healy*, 16 *id.* 88; *Lyman v. Gipson*, 18 Pick. 422.

³ *Clark v. Brown*, *supra*; *Saxton v. Bacon*, 81 Vt. 540. The damages which fence-viewers are authorized to ascertain, are such only as ordi-

§ 185. **Joint Obligation to maintain.** — But unless such a fence has been divided by an agreement between the parties, by a decision of the fence-viewers, or by prescription (that is, by at least twenty years' usage), neither party is obliged to make any particular part of it. There is a joint obligation, by which each is bound to make every part; and, if the fence be defective, each party is chargeable with the consequences of the deficiency. If either neglects to make or repair his just proportion, after notice, the other may make the whole, and recover the contributory share of the negligent party.¹ [Any one occupying land, whether under a written lease, or as tenant at will or sufferance, is entitled to the benefit of the statute and may maintain the action, since the statute is for the benefit of occupants, without respect to the particular estate enjoyed.² But it applies only in favor of the occupants of adjoining lands.³] Upon the escape of cattle from either close into the other, through a defect in any part of the fence, the owner of the cattle is not permitted to allege the escape to be from the deficiency of the other's fence.⁴ If a man's cattle are lawfully placed on A.'s land, and escape thence to the land of another, their owner is entitled to the same exemption from liability that A. might claim in case the cattle had been his, but nothing more. And when B.'s cattle were rightfully pasturing on A.'s land, and escaped thence to the adjoining land of C., through a defect in the division fence which A. was bound to repair, C. was allowed to maintain trespass against B.⁵ Although if A. had the care and custody of such cattle for the purpose of depasturing them, he would also have been

narily accrue from defective fences; and they have no right to assess the value of cattle which escape through a defective fence into a corn-field, and eat so much corn that they die. *Ibid.* A zigzag or Virginia fence was held not a proper fence, *Herrick v. Stover*, 5 Wend. 580; but see *Ferris v. Van Buskirk*, 18 Barb. 397. As to encroachment of fences upon highway, see *Case v. Thompson*, 6 Wend. 634; *Spicer v. Slade*, 9 Johns. 359; *Fitch v. Comm'rs*, 22 Wend. 132.

¹ *Rochester & S. R. R., In re*, 4 Paige, 553.

² *Bronk v. Becker*, 17 Wend. 320.

³ *Stafford v. Ingersol*, 3 Hill, 38.

⁴ *Rust v. Low*, 6 Mass. 90.

⁵ *Stafford v. Ingersol*, *supra*.

liable in the same manner, and to the same extent, as the owner.¹

§ 186. **Certain Animals kept at Owner's Peril. — Highways not Pasture.** — With regard to such animals as are not usually restrained by fences, the owner, whether landlord or tenant, must still keep them on his premises at his peril; and, if they injure his neighbor, he is accountable for the trespass, without regard to the sufficiency of the enclosure. But if they are such animals as are usually restrained by fences, he is not liable for damages if they escape from his premises into his neighbor's land, through the defect of a fence which the neighbor is legally bound to repair.² A dog was said to be an exception to the rule, its owner not being liable for its trespasses.³ With respect to a highway, its dedication as such confers no right to use it as pasture-ground. Subject to the right of passage and to make repairs, the soil, together with the grass and herbage growing thereon, is private property. If cattle are turned upon it for the purpose of grazing, and escape into an adjoining close, the owner of the cattle, unless he owns the soil of that part of the highway on which he turned them, cannot set up the insufficiency of the fences, to excuse the trespass.⁴ But if, while cattle are being driven along the highway, they stray from the owner having them in

¹ *Barnum v. Vandusen*, 16 Conn. 60.

² *Barnum v. Vandusen*, 16 Conn. 60; *Shepherd v. Hees*, 12 Johns. 433. The tenant of a landowner who is bound by contract to maintain the fences along the track of a railroad company cannot recover against the company for an injury to his cattle occasioned by the failure of his landlord to maintain the fences. *Ind. P. & C. R. R. v. Petty*, 25 Ind. 413.

³ *Mason v. Keeling*, 12 Mod. 335; s. c. 1 Ld. Ray. 606.

⁴ *Avery v. Maxwell*, 4 N. H. 36; *Wells v. Howell*, 19 Johns. 385; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Lyman v. Gipson*, 18 Pick. 422. The same principle applies to a common. See *Blyth v. Topham*, Cro. Jac. 158. So, where maple sugar had been left by the defendant in buckets in an open shed on his unenclosed woodland, and the plaintiff's cow came in the night and drank the syrup, which caused her death, it was held that, although the defendant was guilty of negligence, yet the plaintiff, having no right to permit his cattle to go on the defendant's land, could not recover. *Bush v. Brainerd*, 1 Cow. 78.

charge upon adjoining unenclosed land, and he makes fresh pursuit to bring them back, he will not be chargeable for this involuntary trespass, nor for the herbage they may crop as they go along.¹

§ 186 *a*. **Right to remove Fence.** — In the absence of a prescription in favor of the adjoining proprietor, no person is bound to keep up a division fence; and if he wishes to throw his lands open, preferring to be remitted to his common-law rights and duties, he may remove his fences, after giving sufficient notice of his intention.² If, however, he removes his fence without having given the notice required by statute, a party who may be injured thereby is not limited to a suit for the recovery of the actual damages sustained in consequence of such removal; but may, after notice, replace the fence, and recover the expense thereof. If actual damages are sustained, as the loss of a crop, caused by the unlawful removal of the fence, such damages may be recovered in addition.³ But if one gives the required notice, and then removes his portion of the fence, and his cattle pass through the opening upon his neighbor's land, he is liable for the trespass; for the only effect of the statutory permission is to remit the parties to their common-law rights and duties.⁴ An occupant

¹ *Stackpole v. Healy*, 16 Mass. 35. If several animals belonging to different owners unite in doing mischief, each owner is liable for the damage done by his own animal only. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9. In the absence of proof as to how much damage was done by each, the presumption is that all the cattle did equal damage. *Partenheimer v. Van Order*, 20 Barb. 479.

² *Chrysler v. Westfall*, 41 Barb. 159. To exonerate a person from liability to contribute to the cost of a partition fence, he must give notice that he has elected to let his lands lie open to the public. *Perkins v. Perkins*, 44 Barb. 134.

³ *Richardson v. McDougall*, 11 Wend. 46. Evidence that B. and his ancestors had for fifty-six years maintained a partition fence and that said fence was old fifty-six years before, and that B.'s ancestor, then owning the land, said that it had always been maintained by himself and his ancestors, was held proof of a prescriptive obligation on B. to maintain it. *Binney v. Hull*, 5 Pick. 503. And this obligation was not terminated by B.'s becoming a tenant in common of the adjoining land. *Ibid.*

⁴ *Holladay v. Marsh*, 3 Wend. 142.

of land who is bound to maintain a division fence may place half of it, of reasonable dimensions, on the land of the adjoining owner, and he may cut half of a ditch on the land of such owner when a ditch is proper for a partition fence.¹ [No one but the adjoining owner or possessor has an interest in the duty of another to build or maintain a division fence; and the omission to do so, though the want of the fence results in injury to a third person, gives him no ground of action.²]

§ 187. **Right to erect Buildings.** — Every proprietor of land, whether landlord or tenant, is his own judge not only of the propriety of building on it, but also of the manner and extent of building. In the absence of [contrary covenants or] statutory regulations, he may build with what material he pleases, and is under no obligation to give his neighbor the use or advantage of his land, by way of support or easement. If a stranger enters upon his unoccupied land, erects buildings, or makes permanent improvements upon it, he is not obliged to recompense him for any portion of the expense of improvement on recovering possession. And if the stranger, under such circumstances, should undertake to remove such buildings before the owner recovers possession, he is liable for their value.³ [As between landlord and tenant, whatever may have been the doctrine of the ancient law upon the subject, the erection, by the tenant, of buildings on the demised premises is not waste.⁴ And it is open to the tenant to show that by agreement between the parties, extrinsic to the lease, such buildings are to be considered the personal property of the tenant, and so are removable by him at the end of his term, provided that such buildings are so constructed as not to be firmly affixed to the ground.⁵]

¹ *Newell v. Hill*, 2 Met. 180. If one places a fence over the line, the owner of the other property may lawfully remove it. *Thayer v. Wright*, 4 Den. 180.

² *Bronk v. Becker*, 17 Wend. 320; *Ricketts v. E. & W. Ind. Docks Co.*, 12 C. B. 160; *Ryan v. Roch. & S. R. R.*, 9 How. Pr. R. 453.

³ *Moore v. Cable*, 1 Johns. Ch. 385; *Gillet v. Maynard*, 5 Johns. 85; *Dewey v. Osborn*, 4 Cow. 329; *Erwin v. Olmsted*, 7 *id.* 229.

⁴ § 348, *post*.

⁵ *Ryder v. Faxon*, 171 Mass. 206. But where the building is erected

§ 188. **Division-walls, Separate Ownership in. — Party-walls.** — There is no obligation upon the proprietors of adjoining lots to unite in building a party-wall on the dividing line of such lots. The common use of a wall between lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners in equal moieties as tenants in common.¹ But if the precise extent of land belonging to each can be ascertained, the presumption of a tenancy in common does not arise, and each party is the owner of so much of the wall as stands upon his own land.² If a man inserts the beams of his house in his neighbor's wall without permission, it does not thereby become a party-wall, for the owner may pull it down, or sue for a trespass.³ A party-wall is properly that which is built on the common property of two owners of adjoining tenements, at their joint expense, each one continuing owner of his land with an easement in or right to use the wall for the mutual support of their respective buildings. Each owns in severalty the portion of wall standing on his own land; except that neither has a right to pull down the wall so long as it remains sound, without the consent of the other.⁴ But this rule applies only to a wall which is admitted to be a party-wall; for if one of two adjoining owners places half of a wall on the adjoining lot without an agreement that it shall be built at the joint expense, the owner of the latter is not liable to contribute towards the

upon stone foundations, with a cellar under it, without the previous consent of the landowner that it shall be personal property, it seems that it cannot afterwards become personal property by the mere assent of the landowner, without an actual severance of it from the land. *Gibbs v. Esty*, 15 Gray, 587; *Madigan v. McCarthy*, 108 Mass. 376; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519.

¹ *Cubitt v. Porter*, 8 B. & C. 257.

² *Ogden v. Jones*, 2 Bosw. 685; *McConnell v. Kibbee*, 33 Ill. 175; *Peyton v. Mayor*, 9 B. & C. 725.

³ *Roberts v. White*, *supra*; nor is a license to make a window in such a wall a justification of the act of inserting the beams. *Ibid.* If a common wall is erected by tenants for years, though it may be a party-wall as between themselves, it will not create an easement binding upon the owner of the reversion in fee. *Webster v. Stevens*, 5 Duer, 553.

⁴ *Joy v. Bost. Penny Sav. Bk.*, 115 Mass. 60; *Ingals v. Plamondon*, 75 Ill. 118; *Fettretch v. Leamy*, 9 Bosw. 510.

expense of the wall, even if he subsequently uses that part of it which stands upon his own land.¹ A division wall may, however, become a party-wall by agreement either express or implied; for although such a wall may have been built exclusively upon the land of one, if it has been enjoyed in common by the owners of both houses for a period of twenty years, the law will presume, in the absence of evidence to the contrary, that such use and enjoyment were permissive, and with an understanding that the wall should become a party-wall.² If such a wall is casually destroyed, or becomes ruinous, there is no obligation resting upon either owner as against the other to rebuild it, or to unite in building another.³ But the owners of a party-wall dividing their two lots are jointly liable for injuries sustained in consequence of its falling through decay and want of repair.⁴

§ 189. **Respective Rights as to Party-walls.** — A wall may be a party-wall for a portion of its length or height, and an external wall for the residue. Either owner may increase the height of a party-wall if it can be done, without detriment to the strength of the wall, or to the property of the adjoining owner. But he makes such addition at his peril.⁵ And if one proprietor adds to the height of a party-wall, and the other pulls down the addition, the former may maintain trespass for the pulling down so much of it as stood on the plaintiff's soil.⁶ If either pulls down a ruinous party-wall,

¹ *Roberts v. White*, *supra*; *Stockwell v. Hunter*, 11 Met. 445.

² *Brown v. Werner*, 40 Md. 15.

³ *Sherred v. Cisco*, 4 Sandf. 480. In this case a party-wall built at joint expense was destroyed by fire, and the owner of one of the lots, without the concurrence of the owner of the other, built a new wall on the site of the old one. The other owner subsequently built on his lot, and rested his beams in the new wall; and was held justified in doing so, although he had not contributed to the expense of erecting it.

⁴ *Klauder v. McGrath*, 35 Pa. St. 128.

⁵ *Weston v. Arnold*, 22 W. R. 284; 43 L. J. Ch. 123. When a wall for a few feet from the ground is the dividing wall between two houses, and above that is the outside wall of one of them, the lower part may be a party-wall, but the other part is not. *Ibid.* See *Brooks v. Curtis*, 50 N. Y. 639.

⁶ *Matts v. Hawkins*, 5 Taunt. 20; and see *Bradbee v. Christ's Hosp.*,

for the purpose of rebuilding, he is bound to reinstate it in a reasonable time, and with the least inconvenience. If it was necessary to repair the old wall, the neighbor, although bound to contribute ratably to the expense of the new wall, is not bound to contribute towards building it higher than the old one, or with more costly material.¹ But if he takes it down and rebuilds when it was sound and sufficient for the purpose for which it was erected, without the consent of the other, he not only forfeits claim to contribution, but makes himself liable for damages sustained from loss of rent, or necessary repairs.² Whether it was necessary to take down and rebuild the wall is a question of fact; but, supposing it to be necessary and that the work is done with proper skill and caution, the right of an owner of a building to take down a decayed and ruinous party-wall, for the purpose of rebuilding, after reasonable notice to the tenant of the adjoining building, is unquestioned, nor is that right affected by the nature of the use and occupation of the adjoining building.³

4 M. & G. 714. The maxim *qui tacet consentire videtur* was applied in an action to recover the value of one half of a party-wall, the defendant having reason to know that the plaintiff was erecting the wall with an expectation of payment for such value, and allowing him so to act without objection. *Day v. Caton*, 119 Mass. 513. An agreement for a party-wall was held not to prohibit the extension of a building beyond it, in front and in the rear. *Wolfe v. Frost*, 4 Sandf. Ch. 72. An agreement that one owner may insert the beams of his building into the other's wall, and pay for doing so, is a mere license, and need not be in writing. *McLarney v. Pettigrew*, 3 E. D. Smith, 111; *Miller v. Aub. & Sy. R. R.*, 6 Hill, 61; *Pierrepoint v. Barnard*, 6 N. Y. 279.

¹ *Campbell v. Mesier*, 4 Johns. Ch. 334; s. c. 6 *id.* 21; *Weld v. Nichols*, 17 Pick. 538. The cotenant is not liable for the expense of such improvements as are not necessary, in the absence of a contract express or implied; and no contract will be implied from the mere fact that the improvements were beneficial. *Taylor v. Baldwin*, 10 Barb. 626; *Mumford v. Brown*, 6 Cow. 475; *Putnam v. Ritchie*, 6 Paige, 405.

² *Potter v. White*, 6 Bos. 644.

³ *Partridge v. Gilbert*, 3 Duer, 184; s. c. 15 N. Y. 601. Held otherwise where the plaintiff was a lessee, with a covenant for quiet enjoyment. *Armstrong v. Schermerhorn*, 2 N. Y. Leg. Obs. 40. In New York, Philadelphia, Washington, and other cities, party-walls and buildings are specially regulated by statute. As to the effect of a city custom on this subject, see *Bradbee v. Christ's Hosp.*, 4 M. & G. 714.

§ 190. **Easements to use Walls.**—The right to use an ancient wall, in support of an adjoining building, stands upon a different footing.¹ If it was not strictly a party-wall, and the walls of the house pulled down stood wholly on its own lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period of time sufficient to establish an easement by prescription, the owner of the adjoining house would be entitled to have his beams inserted in the new wall.² But, with respect to a partition wall erected partly on each lot for the purpose of supporting both buildings, each owner has an easement in it, for the support of his own house. Neither has any right to remove or underpin it, partially or wholly, unless it can be done without injury to the other's house. And if the owner of two adjoining lots erects buildings on them, with a wall standing partly on each, intended to furnish a support to both buildings, and which has been used for such a purpose, and then conveys either house and lot with its appurtenances, he thereby grants an easement for the support of the house conveyed in so much of the wall as stands on the other lot, and makes it a party-wall. After such a grant, neither can remove the wall, nor so deal with it as to render it an inefficient support for the other's building without his consent. If either wishes to improve his own premises before the wall has become ruinous or incapable of further answering its purpose, he must do it at his own risk and expense.³ In such cases, neither owner nor occupant can interfere with the wall, to the detriment of the other, without his consent. But where a common wall is

¹ An ancient wall is one built to be used, and that has in fact been used, as a party-wall for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands. *Eno v. Del Vecchio*, 4 Duer, 58, 68.

² 3 Kent's Com., 437.

³ *Eno v. Del Vecchio*, 4 Duer, 53; s. c. 6 *id.* 17; *Bradbee v. Christ's Hosp.*, 4 M. & G. 714; *Hide v. Thornborough*, 2 C. & K. 250. Where the owners of adjoining lots by agreement construct a wall partly on each lot, for the common support of their buildings, the wall so constructed, if used as such for twenty years, becomes a party-wall, and the owner of each house has an easement for its support in that portion of the wall which stands on the adjoining lot.

erected by tenants for years, although it may be a party-wall as between themselves, it will create no easement binding on the owner of the reversion in fee, to prevent him, when the term expires, from dealing with his property as if no such wall had been erected.¹

§ 191. **Boundary Trees, Ownership and Rights in.** — As a man may abate an encroachment on his property, so he may cut the roots of a tree encroaching, or lop its overhanging branches.² If the tree grows in a hedge, dividing the land of two, with the roots extending into the land of each, they are tenants in common of the tree; but if it stands on my side of the line, and the roots grow in my land, the whole property of the tree is in me, though the boughs overshadow his land; and although my neighbor may have a right to cut away the branches or the roots on his side, he has no right to convert either the branches or the fruit to his own use.³ And if line trees are destroyed by one adjoining proprietor, he is liable in trespass to the other, whether the other's interest be several, or that of a tenant in common.⁴ One may, also, justify an entry on his neighbor's land, to retake his own property, which has been removed thither by accident, as in the instance of fruit falling upon the ground of another; or of a tree which is blown down or through decay falls upon the ground of a neighbor; in which cases the owner of the fruit, or of the tree, may show that he was not responsible for the accident, and thus justify the entry. But if the fruit, or the tree, so falls in consequence of the owner's wilful act, or negligence, he cannot justify the entry.⁵

¹ *Webster v. Stevens*, 5 Duer, 558.

² *Jones v. Powell*, Palm. 586. And see *Hoffman v. Armstrong*, 48 N. Y. 801.

³ *Welch v. Nash*, 8 East, 894; *Dyson v. Collick*, 5 B. & A. 600; *Beardslee v. French*, 7 Conn. 125; *Lyman v. Hale*, 11 *id.* 177; *Master v. Pollier*, Rolle, 114; *Betts v. Lee*, 5 Johns. 848.

⁴ *Dubois v. Beaver*, 25 N. Y. 123.

⁵ Per Tindall, C. J., in *Anthony v. Haney*, 8 Bing. 192.

SECTION IV.

LIABILITY FOR NEGLIGENCE.

§ 192. **Tenant's Duty to Strangers.**—The tenant's general obligation to repair, and so to use and manage the property in his possession that others shall receive no injury therefrom, is co-extensive with that of every other occupant of fixed property,¹ rendering him liable to answer for any injury that may be sustained by his neglect to guard against its want of safety or any reckless management thereof, as, by not keeping the area in front of his house fenced, or the covers of his vaults sufficiently closed, so that a person walking along in the street falls through and is injured. [The criterion of the tenant's responsibility is in the fact of his actual possession, not in his relation as tenant.²] Where the tenant directs his servant to remove snow or ice from the roof of his house, which he does by negligently throwing it into the street, he becomes liable for any injury that may be received by a passenger therefrom, whether the negligence was that of the servant or of some one whom the servant employed or requested to assist him.³ If he maintains a sink or vault upon his premises, from which filthy water filters upon the land of his neighbor, and injures a cellar or well, he becomes liable in damages for the injury without other proof of negligence.⁴ If he repairs or improves the building, he must guard against accidents to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of danger.⁵ It is also held in New York that any

¹ See §§ 175, 175 *a*, 182, *ante*.

² *Feital v. Midd. R. R.*, 109 Mass. 398. Thus it was held here that a railroad company lessee was liable for injuring a passenger, though the lease was illegal and void, as it was in actual possession and use of the tract without objection from the owner. See § 126 *a*, *ante*.

³ *Althorf v. Wolfe*, 22 N. Y. 366; *Blake v. Ferris*, 5 *id.* 48; *Cheatham v. Hampson*, 2 T. R. 318; *Chicago v. Robbins*, 2 Black, 418; *Randleson v. Murray*, 8 Ad. & E. 109.

⁴ *Ball v. Nye*, 99 Mass. 582.

⁵ *Sexton v. Zett*, 44 N. Y. 430. Applied to the case of post-holes for a fence dug on the line of the street. *Wright v. Saunders*, 65 Barb. 214.

one who makes an excavation under or along the highway remains responsible for any injury from the defective condition of the coverings thereof.¹ As to persons resorting to his premises, or upon his invitation express or implied, every tenant is bound to exercise reasonable care to prevent damage happening to them from faults in the construction of the buildings, which he knows of or has reason to apprehend.² Thus the keeper of a public-house was charged with negligence in not sufficiently protecting the plaintiff, who visited the house as a guest, from a weakness in the floor through which he fell and was hurt.³ But where in going along a dark passage the plaintiff fell down an ordinary stairway, he was not allowed to recover any damages, for he ought to have taken a light with him; and that the defendant's servant directed the plaintiff to go where he did made no difference.⁴ [The general subject of the negligence of owners of property, and the contributory negligence of persons entering upon the property, is without the scope of this work.]

§ 193. **Liability of Owners of Structures, etc.** — For a similar reason one who causes a building to be erected for a public exhibition, and admits persons thereto on the payment of money, is bound to see that due care is taken in its erection, and that it is reasonably fit for the purpose; and it is immaterial whether the money is for his own use or not.⁵ It

¹ *Congreve v. Smith*, 18 N. Y. 79; § 175, *ante*.

² *Phil. R. R. Co. v. Kerr*, 25 Md. 521; *Carlton v. Franc. Iron Co.*, 99 Mass. 216; *Chapman v. Rothwell*, El. B. & E. 168; *Indermaur v. Dames*, 1 Harr. & R. 243, L. R. 2 C. P. 311, holding that if the premises are in any respect dangerous, he must give his visitors sufficient warning thereof to enable them by the use of due care to avoid the danger.

³ *Axford v. Prior*, 14 W. R. 611.

⁴ *Wilkinson v. Fairrie*, 1 Hurlst. & C. 633.

⁵ *Francis v. Cockrell*, L. R. 5 Q. B. 501, s. c. affirmed, *id.* 184. In an action against the proprietors of a public exhibition, for not properly maintaining a staircase, which fell and injured the plaintiff, who had paid for his admission, there having been alterations which caused the fall, it was left to the jury to say whether the proprietors had employed proper persons to make the alterations, and whether those persons had used proper care and skill. *Brazier v. Polytechnic Inst.*, 1 F. & F. 517. Where a sign of "no admittance" is placed on the door, one who enters

is the duty of a wharfinger to give information as to inequalities in the surface of the bottom when that is material to the safety of the vessel about to moor at his wharf; but he is not bound to maintain a depth of water at his wharf sufficient for all vessels at all tides. Nor is the master of the ship relieved from the responsibility of ascertaining whether the depth of water is sufficient for the draught of his vessel.¹ [It has been held that] the owner of dangerous machinery who leaves it in an open place on his own land, where he has reason to believe that children will be attracted to play with it, is bound to reasonable care to protect such children from the danger to which they are thus exposed.² A master may be responsible to his servant for injuries received from defects in the building in which the services were rendered, and which the master knew or ought to have known and guarded against.³ But although a landlord may be liable for an unsafe condition of the premises, the tenant will not thereby be absolved from his responsibility to third persons, for a neglect to make such repairs as are incumbent upon him.⁴

cannot recover for an injury caused by negligence in the management of the room, even though no further warning was given. *Zoebis v. Tarbell*, 10 Allen, 385. It is held that the landlord of a structure erected for a public purpose is not liable to injuries resulting from the defective condition of the building, to third persons lawfully going upon the premises, unless he has wilfully concealed the defects. *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245 (Ruger, C. J., Danforth & Finch, JJ., dissenting); and see *Bard v. Same*, 10 Daly, 520; § 175, *ante*.

¹ *Nelson v. Phoenix Chem. Works*, 7 Ben. 87.

² *Keefe v. Milw. Co.*, 21 Minn. 207. The owner of a private way through a lumber-yard is not liable for injuries received from the falling of a pile of lumber upon children who were trespassers there, the owner having ordered all children to be driven off, and employed a proper person to carry out his orders. *Vanderbeck v. Hendrey*, 84 N. J. 467.

³ *Ryan v. Fowler*, 24 N. Y. 410. But not for the explosion of a kitchen boiler, properly constructed, simply because it had no safety-valve. *Jaffe v. Harteau*, 56 N. Y. 898.

⁴ *Whalen v. Gloucester*, 6 Thomp. & C. 135; *Radway v. Briggs*, 87 N. Y. 256. Where a husband and wife live upon premises, the property of the latter, the former is not presumed to be so in control thereof as to make him liable for injuries sustained by the careless leaving of a pit uncovered thereon, and to make him responsible, evidence must be given

§ 194. **To Intruders and Trespassers.** — The responsibility for injuries resulting from negligence does not extend to persons who are on the premises unlawfully, or without permission. As where the owner of several lots, upon the rear of which were tenements, commenced building upon their front, and opened a way through an adjoining lot for his tenants; of which he notified them; it was held that a visitor who, in attempting to enter the tenements, passed into the unfinished buildings in the night-time, and fell through the floor and was injured, could not recover for such injuries.¹ But a person who is injured by the negligence of another is not barred of his remedy by the fact that at the time of the injury he was trespassing upon the premises of the person injuring him, if his trespass does not involve negligence on his own part substantially contributing to produce the injury.² Or if the negligence of the defendant is so gross and wilful as to imply a disregard of consequences or a design to inflict an injury, the plaintiff may recover, though he was a trespasser.³

§ 194 *a.* **For Illegal and Dangerous Acts.** — Where that which is done by a person on his own land is illegal and punishable as such; or though not illegal, such as may probably endanger human life, as the setting of dangerous traps or spring guns, he may be responsible even to a trespasser, for injuries thus sustained by him.⁴ But although such traps or guns may be lawfully placed upon private grounds, for the purpose of deterring trespassers, or preventing strange animals from doing damage, yet full notice must be given of the fact; and if no notice, or an insufficient notice, is given, the person so placing them is responsible for all injuries caused by them even to a trespasser.⁵ Where the plaintiff had notice that deadly engines were placed in a wood into which he notwithstanding entered of his participation in the wrong, or of obligation on his part to remove the cause of injury. *Fiske v. Bailey*, 51 N. Y. 150.

¹ *Roulston v. Clark*, 3 E. D. Smith, 866.

² *Daley v. Norwich Co.*, 26 Conn. 591; *Norris v. Litchfield*, 35 N. H. 271.

³ *Lafayette R. R. Co. v. Adams*, 26 Ind. 370; *Clark v. Kirwan*, *supra*.

⁴ *Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, 8 M. & W. 782.

⁵ *Bird v. Holbrook*, *supra*; *Townsend v. Watken*, 9 East, 277.

and was injured, it was held that he could not maintain an action.¹

§ 195. **For Injuries done by Animals.**—The liability of an owner or keeper of animals, for injuries committed by them, is founded upon his actual or presumed negligence in failing to prevent their doing such injuries.² Thus he is liable in damages for keeping a dog which is accustomed to bite mankind; and even if it is not his, he is liable if he harbors or allows it to resort to his premises.³ But he must be aware that the dog was a ferocious animal, and accustomed to bite;⁴ and he will be exonerated from responsibility, if, being a strange dog, he has endeavored without success to drive it from his premises.⁵ One cannot recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he has reasonable and justifiable cause for being in the place where the dog was. And if he was lawfully upon the premises, the circumstance of there being a notice posted warning persons to beware of the dog, will be no answer to a claim for damages, if he was not able to read it.⁶ So a warning, previously given, is no excuse, if the accident was not occasioned by the plaintiff's own carelessness or want of caution.⁷ The owner of sheep which had been worried by a dog

¹ *Pott v. Wilks*, 3 B. & A. 304.

² *Buckley v. Leonard*, 4 Den. 500; *Meredith v. Reed*, 26 Ind. 334.

³ *Sarch v. Blackburn*, 4 C. & P. 292; *Curtis v. Mills*, 5 *id.* 489.

⁴ *Woolf v. Chalker*, 31 Conn. 121; *Kitteridge v. Elliott*, 16 N. H. 77; *Cogswell v. Baldwin*, 15 Vt. 404; *Stumps v. Kelley*, 22 Ill. 140; *McKone v. Wood*, 5 C. & P. 1; *Hogan v. Sharpe*, 7 *id.* 755; *Jenkins v. Turner*, 1 Ld. Ray. 109; *Rex v. Huggins*, 2 *id.* 1583; *Van Leuven v. Lyke*, 1 N. Y. 515; *Laverone v. Mangianti*, 41 Cal. 138; *Wheeler v. Brant*, 23 Barb. 324.

⁵ *Smith v. Great E. R. R. Co.*, L. R. 2 C. P. 4; *Hewes v. McNamara*, 106 Mass. 281.

⁶ *Sarch v. Blackburn*, *supra*; s. c. Mood. & M. 505; *Blackman v. Simmons*, 3 C. & P. 138; *Howland v. Vincent*, 10 Met. 371. A technical trespass by the plaintiff is no defence to an action for an injury received from a vicious dog. *Loomis v. Terry*, 17 Wend. 476; *Sherfey v. Bartley*, 4 Sneed, 5.

⁷ *Curtis v. Mills*, *supra*. In *May v. Burdett*, 9 Q. B. 101, and *Jackson v. Smithson*, 15 M. & W. 563, it was held that the keeper of a mis-

in a field is not justified in shooting the dog, when in another field and at some distance off; as it cannot then be said to have been done in the protection of his property.¹

§ 196. **For Fires beginning on the Premises.**— At common law, if a fire began in a dwelling-house and extended to neighboring property, the tenant of the house where the fire originated was responsible for all damages done, whether the fire was caused by the act of himself, his servant, or his guest.² But a statute of Queen Anne, amended by 14 Geo. III. c. 78, provided that no action should be had against any person, in whose house, chamber, or other building, or on whose estate, any fire should accidentally begin; and this statute has been generally re-enacted in the United States. This protection extends only to a case of accidental fire, that is, one which cannot be traced to any particular or wilful cause, and stands opposed to the negligence of either servant or master; and an action will lie against one upon whose premises a fire commences through the negligence or misconduct of himself or his servants, and which causes injury to adjacent property;³ and want of ordinary care is sufficient to charge the defendant.⁴ But it is held that the spreading of the fire to a neighboring house not adjacent to that in which the fire originated does not give the owner of that house a right of action for damages, since these are the remote and not the immediate results of the defendant's acts.⁵ A tenant is answerable to

chievous animal is bound to keep it securely at his peril; and, if any injury is done by it, negligence in the owner is presumed to have been the cause of the injury.

¹ Wells v. Head, 4 C. & P. 568; McAneany v. Jewett, 10 Allen, 151. A ferocious dog is a nuisance; and, if allowed to run at large, may be killed by any one. Putnam v. Payne, 13 Johns. 312; Hinckley v. Emerson, 4 Cow. 351.

² “*Si mon feu per misfortune arde les biens d'autre home, il avera action sur le case vers moy.*— 2 Hen. IV. 18.” Roll. Abr. Action on Case, B. p. 1; Tubervil v. Stamp, 1 Salk. 13.

³ Filliter v. Phippard, 11 Ad. & E. Q. B. 347; Webb v. Rome, W. & O. R. Co., 49 N. Y. 420.

⁴ Barnard v. Poor, 21 Pick. 378; Todd v. Collins, 1 Halst. 127.

⁵ Ryan v. N. Y. Cent. R. R., 35 N. Y. 210; Penn. R. R. Co. v. Kerr, 62 Pa. St. 853.

his lessor, if a building on the demised premises is destroyed by fire through his carelessness or negligence; and is bound to rebuild, at his own expense, within a reasonable time.¹ And when an occupant of land negligently sets fire to the fallow or wood thereon for the purpose of improving it, and unwittingly injures his neighbor, he will be answerable for the damage. And in an action brought for an injury to the reversion, occasioned by the defendant's making a rick of hay on his land, so near to some cottages of the plaintiff that they were burned by the spontaneous ignition of the hay; and it was proved that the hay had been put up in a green condition, when, as is well known, it will ferment and ignite, the defendant was held liable.²

§ 197. **For Acts not in themselves Unlawful.** — It is a sound maxim, that requires every person to exercise his own rights so as not to injure those of his neighbor; wherefore, a person acting in the exercise of his right of property and so doing damage to his neighbor will be liable to an action, if the damage might have been prevented by the use of reasonable care. English law seems to have gone to the extent of making a man liable for damages, even when caused by a mere casualty which could not be avoided; regarding not so much the intent of the actor as the loss and damage of the party suffering, holding

¹ Co. Lit. 53, b; *Rook v. Warth*, 1 Ves. Sr. 462. In the case of *Clark v. Foot*, 8 Johns. 421; *Maull v. Wilson*, 2 Harringt. 443.

² *Sutton v. Clarke*, 6 Taunt. 44; *Cook v. Champl. Tr. Co.*, 1 Den. 91. In *Hanlon v. Ingram*, 3 Iowa, 81, Wright, C. J., says: "All of the circumstances should be carefully weighed, and unless they disclose with reasonable certainty that in setting out the fire, and preventing its escape, the defendant has used those precautionary measures which, as a prudent and cautious man, he would take with reference to his own property, he will be liable." And see *Jordan v. Wyatt*, 4 Gratt. 151. Plaintiff's wood was on the defendant's land, and defendant having given plaintiff a reasonable notice of his intention, and required him to remove it, set fire to his fallow, and the wood still remaining upon the land was burned; and the defendant was held not to be liable. *Bennett v. Scutt*, 18 Barb. 347. In case of damage from burning fallow, the mere fact that the fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, does not show negligence. *Stuart v. Hawley*, 22 Barb. 619.

that he who receives damage ought in any event to be recompensed. As if, in building his house, a piece of timber accidentally falls on the neighboring house, and injures it; or if a man assaults him, and, in lifting up his staff to defend himself, it strikes another, although he did a lawful thing.¹ But the American authorities hold that no liability results from the commission of an act purely accidental.² But every man is bound to take such precautions against injury as a man of ordinary prudence usually takes in his own affairs. Thus a shop-keeper, who invites the public to his shop, is held liable for neglect on leaving a trap-door open, without sufficient protection, by which his customers suffer injury.³

§ 198. **Owner bound to Reasonable Care.** — Wherever the acts of a person although done entirely on his own property may be productive of injury to another, he is bound to exercise such a degree of care as shall enable other persons, exercising reasonable care on their part, to avoid the danger. If he has used such care, he will not be liable for an injury arising from the interference of a wrong-doer. Thus, in an action for negligently permitting the flap of the defendant's cellar to remain unfastened, whereby it fell upon and broke the plaintiff's legs, it was held that while the defendant was bound to exercise ordinary care in securing it, he was not responsible for the act of a wrong-doer in displacing it.⁴

¹ *Vaughan v. Menlove*, 3 Bing. N. C. 468. See also *Rex v. Comm'rs*, 8 B. & C. 355; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Aldridge v. Great West. R. R.*, 4 Scott, N. R. 156.

² *Dygert v. Bradley*, 8 Wend. 469; *Taylor v. Atlantic Ins. Co.*, 9 Bosw. 369; *Brown v. Kendall*, 6 Cush. 292; *Losee v. Buchanan*, 51 N. Y. 491; *Calkins v. Berger*, 44 Barb. 424; *McGrew v. Stone*, 53 Pa. St. 436; *Lawler v. Baring Boom Co.*, 56 Me. 448.

³ *Parnaby v. Lancaster Coal Co.*, 11 Ad. & E. 223-243; *Freer v. Cameron*, 4 Rich. Law, 218. In *Karl v. Maillard*, 3 Bosw. 591, it was held culpable negligence to have an open unguarded hoistway within six feet of the entrance to a building.

⁴ *Daniels v. Potter*, 4 C. & P. 262. Negligence is defined to be any violation of the obligation which enjoins care and caution in what we do. It is the omission of a duty. *Tonawanda R. R. v. Munger*, 5 Den. 255; *Carroll v. N. Y. & N. H. R. R.*, 1 Duer, 571, 583. And see *Mayor v. Bailey*, 2 Den. 433; *Brand v. Schenect. & T. R. R.*, 8 Barb. 368; *Chase*

§ 199. **Care to be proportioned to Danger : Rule of Contributory Negligence.**—The degree of care which is necessary to be taken by persons who would avoid liability in cases of damage arising from casualties is, in general, that which persons of ordinary prudence are presumed to make use of under similar circumstances to avoid injury, and should be proportioned to the injury to be avoided and to the consequences involved in its neglect.¹ But where there is equal negligence on both sides, without any intentional wrong on the part of either, or if the plaintiff, by his own negligence or otherwise, has contributed, substantially, to produce the injury complained of, no action lies.² A party, on the one hand, cannot recover damages for an injury which he has brought upon himself, neither will he, on the other, be permitted to shield himself from an injury which he has committed because the injured party was in the wrong, unless such wrong contributed to produce the injury.³ If a person, in the lawful use of his property, exposes

v. N. Y. Cent. R. R., 24 *id.* 278. See *Proctor v. Harris*, 4 C. & P. 337; *Smith v. Smith*, 2 Pick. 621; *Grant v. Ludlow*, 8 Ohio St. 1. *Ordinary care* means that care and foresight which men of ordinary prudence are accustomed to make use of; *Johnson v. Huds. Riv. R. R.*, 6 Duer, 633; while *ordinary neglect* is the omission of that care which every man of common prudence takes of his own concerns: *Scott v. De Peyster*, 1 Edw. 513. The term negligence embraces acts of omission as well as of commission. *O'Brien v. R. R. Co.*, 3 Phila. 76; *Bizzell v. Baker*, 16 Ark. 308; *Johnson v. Huds. Riv. R. R. Co.*, 20 N. Y. 65.

¹ *Toledo R. R. Co. v. Goddard*, 25 Ind. 185; *Ernst v. Huds. Riv. R. R. Co.*, 35 N. Y. 9; *Fallon v. Boston*, 3 Allen, 88; *Unger v. Forty-Second St. R. R. Co.*, 51 N. Y. 497; *Heathcock v. Pennington*, 11 Ired. 640.

² *Brownell v. Flagler*, 5 Hill, 282; *Wilds v. Huds. Riv. R. R.*, 24 N. Y. 430; *Sills v. Brown*, 9 C. & P. 605; *Wynn v. Allard*, 5 W. & S. 524; *Smith v. Dobson*, 3 M. & G. 59; *Brown v. Maxwell*, 6 Hill, 592; *Rathbun v. Payne*, 19 Wend. 899. One who complains of another's negligence should himself be without fault. *Warner v. N. Y. Cent. R. R. Co.*, 44 N. Y. 465; *Chicago R. R. Co. v. Kauffman*, 28 Ill. 513; *Noyes v. Morris*, 1 Vt. 353; *Lane v. Crombie*, 12 Pick. 177; *State v. Balt. R. R. Co.*, 24 Md. 84; *Drake v. Mount*, 33 N. J. 441.

³ *N. H. St. & Tr. Co. v. Vanderbilt*, 16 Conn. 420. For cases of concurring negligence, see *Owen v. Huds. Riv. R. R.*, 2 Bosw. 874; s. c. 35 N. Y. 56; *Indianapolis R. R. Co. v. Wright*, 22 Ind. 876; *Balt. R. R. Co. v. State*, 29 Md. 252. If the plaintiff has used ordinary care, he cannot

it to accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such others. The owner of land on the shore of a stream, or adjoining the track of a railroad, may lawfully build thereon, though the situation be one of exposure and hazard; and he is entitled to protection against the negligent acts of persons passing with vessels or carriages propelled by steam-engines, by which such buildings may be set on fire. And in an action for damages he may show that experienced persons, in such employments, are accustomed to use precautions which the defendants neglected; the tendency of such evidence not being to establish a local law or usage;¹ while a defendant may show that he took all such precautions to guard against injury as would have been taken by a man of ordinary prudence.² The question of negligence is generally for a jury,³ but where the facts are undisputed the question of contributory negligence is one of law.⁴

SECTION V.

OF NUISANCES.

§ 200. **Actions for, by Landlord and Tenant.**—The tenant's possessory interest will enable him to maintain actions growing out of any act by which his possession is immediately affected, or the consequences of which are injurious to his possession.⁵ And such actions may be either to recover damages for an injury already sustained, or for an injunction to prevent

be said to have contributed to the negligence. *Center v. Finney*, 17 Barb. 94; *Eakin v. Brown*, 1 E. D. Smith, 86. That this doctrine is to be cautiously applied, where the fault of the defendant has been clearly established, see *Clark v. Kirwan*, 4 E. D. Smith, 21.

¹ *Cook v. Champ. Tr. Co.*, 1 Den. 91.

² *Furth v. Foster*, 7 Rob. (N. Y.) 484.

³ *Moore v. Westervelt*, 21 N. Y. 103; *Barton v. N. Y. Cent. R. R. Co.*, 56 *id.* 660; *Hanover R. R. Co. v. Cayle*, 55 Pa. St. 96; *Garland v. Towner*, 55 N. H. 55.

⁴ *Morrison v. Erie R. R. Co.*, 56 N. Y. 302; *Aycrigg v. Erie R. R. Co.*, 80 N. J. 460.

⁵ *Evans v. Evans*, 2 Camp. 491; § 178, *ante*.

further injury, or both. The injury may be to the dwelling-house by rendering it uncomfortable or untenable; or to the land, as by overflowing it with water; or to some incorporeal hereditament annexed to the estate, as by the obstruction of a right of way.¹ And, if the injury affects the reversion, both landlord and tenant may have distinct actions for the same wrongful act; as, for an injury to trees the landlord may have an action for injury to the body of the tree, and the tenant in respect to its shade or fruit.² If the trees have been cut down, the tenant may have trespass against the wrongdoer for breaking in upon his premises, and the landlord trover for the trees carried away.³ An action of trespass also lies in favor of the tenant, if a man builds a house so close to his that the roof overhangs, and throws the water upon it; or if a person erects anything offensive so near his dwelling as to render it useless or unfit for habitation; as, a pigsty, tobacco-mill, tannery, or privy.⁴

§. 201. **What may constitute.** — Any offensive erection which, from its nature, may be an annoyance, and from its situation actually becomes so, is a nuisance. A slaughter-house in a city is held to be, *primâ facie*, a nuisance to the neighborhood; and, to make it such, it is not necessary that the noxious business should endanger the health of the neighborhood. It is sufficient if it be offensive to the senses, and renders the enjoyment of life uncomfortable.⁵ And a coal-

¹ *Trower v. Chadwick*, 3 Bing. N. C. 834; *Panton v. Holland*, 17 Johns. 92; *Dodd v. Holme*, 1 Ad. & E. 493; *Thurston v. Hancock*, 12 Mass. 220; *Acton v. Blundell*, 12 M. & W. 324; *Ulrich v. McCabe*, 1 Hilt. 251.

² *Bedingfield v. Onslow*, 3 Lev. 209; *Starr v. Jackson*, 11 Mass. 519; *Shadwell v. Hutchinson*, 4 C. & P. 333. But the landlord's remedy is case and not trespass. *Wentworth v. Portsm. & D. R. R.*, 55 N. H. 540.

³ *Berry v. Heard*, Cro. Car. 242; 2 Inst. 303.

⁴ *Aldred's Case*, 9 Co. 59, a; *Penruddock's Case*, 5 *id.* 100; *Wynn v. Alard*, 5 W. & S. 524; *Howel v. McCoy*, 3 Rawle, 256; *Bellows v. Sackett*, 15 Barb. 96; *Whalen v. Keith*, 35 Mo. 87; *Aiken v. Benedict*, 39 Barb. 400; and see § 775, *post*.

⁵ *Catlin v. Valentine*, 9 Paige, 575; *State v. Purse*, 4 McCord, 472; *Meigs v. Lister*, 8 C. E. Green, 199. Nuisance, in its largest sense, signifies anything that worketh hurt, inconvenience, or damage. 3 Bl. Com.

yard or a stable may be so negligently conducted as to become a nuisance to the neighboring inhabitants, although it is not necessarily a nuisance, and only becomes such by being so

215. It is either public, annoying all the members of a community, or private, injuriously affecting the lands, tenements, or hereditaments of an individual. *Norcross v. Thoms*, 51 Me. 503; *Coker v. Birge*, 9 Ga. 425. To make a noxious trade a nuisance, it is not necessary that it should endanger the health of the neighborhood. It is sufficient if it produces that annoyance which is offensive to the senses, and impairs the enjoyment of life and property. *Catlin v. Valentine*, *supra*; *Brady v. Weeks*, 8 Barb. 157; *Rex v. Neil*, 2 C. & P. 485. A fat-boiling establishment is a nuisance if it infects the air with noisome smells and gases, prejudicial to health. *Cropsey v. Murphy*, 1 Hilt. 126. So of a livery stable, if it renders a neighboring dwelling-house unfit for habitation. *Aldrich v. Howard*, 8 R. I. 246; or a lime-kiln, or pottery, in close proximity to the plaintiff's residence. *Hutchin v. Smith*, 68 Barb. 251; *Ross v. Butler*, 19 N. J. Eq. 294, a house of prostitution; *Jacobowsky v. People*, 13 N. Y. 524; a soap-boiling establishment in a city, *Howard v. Lee*, 3 Sandf. 281; the bleating of calves kept overnight at a slaughter-house, *Bishop v. Banks*, 33 Conn. 118; a dilapidated sewer, *McCarty v. City of Syracuse*, 40 N. Y. 194; a bowling-alley kept for gain and common use, where noises at night disturb the neighborhood, *State v. Haines*, 30 Me. 65; disorderly inns and gambling-houses in places densely populated, *Hackney v. State*, 8 Ind. 494; *State v. Doom*, R. M. Charl't. Ga. 1. But maintaining a house for prostitution or the illegal sale of liquors does not render the house itself, or its inmates or contents, nuisances. *Miller v. Forman*, 37 N. J. L. 45; *Brown v. Perkins*, 12 Gray, 101. A carriage manufactory or a blacksmith's shop may be erected in such a place that its use will result in an injury to a neighbor, for which the wrong-doer is responsible. *Whitney v. Bartholomew*, 21 Conn. 213. So a tomb erected on a man's own land may become a nuisance. *Barnes v. Hathorn*, 54 Me. 124. There may be circumstances where the jar or even the noise of a steam-engine may become a nuisance, and its use on that account and in that particular manner be restrained. *Davidson v. Isham*, 1 Stark. 186; *McKeon v. Lee*, 51 N. Y. 300. Whatever is permitted by a constitutional statute, is not in law a nuisance. *Leigh v. Westervelt*, 2 Duer, 618; *Harris v. Thompson*, 9 Barb. 350; *Plant v. L. I. R. R.*, 10 *id.* 26; *Williams v. N. Y. C. R. R.*, 18 Barb. 222. But any excess or irregularity in the exercise of a power conferred by statute may be a nuisance *pro tanto*. *Renwick v. Morris*, 7 Hill, 575; *Adams v. Beach*, 6 *id.* 271. Where the legislature declared a stream to be a public highway, and afterwards enacted a law authorizing the riparian owners to erect a dam across it; it was held that the latter act restored the common-law right of the owners to obstruct the navigation, but did not legalize the dam, if otherwise a nuisance. *Clark v. Mayor*, 13 Barb. 32.

carelessly used as to become obnoxious to the neighborhood.¹ So the keeping a large quantity of gunpowder in a wooden building, insufficiently secured and situated near other buildings, thereby endangering the lives of persons residing in the vicinity, amounts to a public nuisance.² And if an accident occurs therefrom, by which an individual is wounded, he may recover damages against the party guilty of the nuisance, although the accident may not have been occasioned by any negligence of his.³ Even a private dwelling-house may be kept in so negligent and filthy a manner as to become a nuisance,⁴ or a tenement-house inhabited by a crowd of poor people in a filthy condition calculated to breed disease.⁵ In all such cases a householder may recover damages caused by the nuisance, though not himself driven from his own dwelling. Thus the keeper of a boarding-house, whose boarders were driven away by the offensive smells proceeding from a livery

¹ *Barrow v. Richard*, 8 Paige, 351; *Russell v. Popham*, N. Y. Leg. Obs. 272. Gas-works are not within the ordinary uses of real estate, and, whenever they produce a special injury, are nuisances. *Carhart v. Aub. Gas Co.*, 22 Barb. 297; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *Howard v. Lee*, 3 Sandf. 256. And it is sufficient to show that the property has been rendered less valuable for the purposes to which the owner has seen fit to devote it. *First Bapt. Church v. Schen. & T. R. R.*, 5 Barb. 79; *Trustees v. Utica & S. R. R.*, 6 *id.* 313. Stationing before the door of a mock-auction room a man with a placard inscribed "Beware of mock-auctions," was held to be a private nuisance. *Gilbert v. Mickle*, 4 Sandf. Ch. 357.

² *People v. Sands*, 1 Johns. 78.

³ *Myers v. Malcomb*, 6 Hill, 292; *Rex v. Taylor*, 2 Stra. 1167; *Duncan v. Thwaites*, 3 B. & C. 556; *Pierce v. Dart*, 7 Cow. 609; 4 Wend. 25; *Mayor v. Furze*, 3 Hill, 612.

⁴ *State v. Purser*, *supra*. The tenant of premises is alone liable for a nuisance resulting from his own act or negligence in the use of the premises; but for a nuisance resulting from the structure of the building, the owner is liable. As to an open area in front of the building, both owner and occupant are bound to render it safe to the public. *Durant v. Palmer*, 5 Dutch. 544. A person having an artificial drain under his house is bound so to keep it as not to do injury to his neighbor, although he has been guilty of no negligence and the existence of this drain was in no way known to him. *Humphries v. Cousins*, 2 C. P. D. 239; and see *Jackman v. Arlington Mills*, 137 Mass. 277.

⁵ *Meeker v. Van Rensselaer*, 15 Wend. 397.

stable set up in an adjacent house, was allowed to recover against the keeper of the stable for damages sustained by the loss of his boarders.¹

§ 201 *a*. **Obstruction of Ways.** — It is a nuisance to obstruct a highway or render its use hazardous, by an excavation or the like; or to place upon the foot-path of a public street a stall or stand for the sale of fruit, although rent is paid to the adjoining proprietor for the privilege.² The law will only tolerate such a partial and temporary obstruction in the street as may be necessary for purposes of business, as in receiving and delivering goods from a warehouse, or the like. In a case where the defendant was indicted for a nuisance in placing goods on the foot-way and carriage-way in a public street, and suffering them to remain for the purpose of being sold at auction, thereby rendering the passage less convenient, but not entirely obstructing it, it was said: "The necessity which justifies such a nuisance must be a reasonable one. No one has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, he may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it can be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it."³

¹ *Aldrich v. Howard*, *supra*; *Fish v. Dodge*, 4 Den. 311. The landlord may be joined in such an action if he leased the house to be converted into a stable under such circumstances as would have led to a reasonable belief that it would become a nuisance. *Ibid*.

² *Morton v. Moore*, 15 Gray, 573; *Gerrish v. Brown*, 51 Me. 256; *Irvine v. Wood*, 51 N. Y. 224; *Dimmett v. Eskridge*, 36 Munf. 308.

³ *Commonwealth v. Passmore*, 1 S. & R. 217. Any unauthorized continuous obstruction to the passage of the public along a street is a nuisance. *Davis v. Mayor*, 14 N. Y. 506. So for a wagoner to keep wagons constantly before his storehouse, in the street, although there was sufficient room for two carriages to pass abreast on the opposite side. *King*

§ 201 *b*. **Business carried on in Street.**—Nor can a man habitually carry on any part of his business in the street, to the annoyance of the public. Private interests must be made subservient to the general interests of the community, who are not to be prevented from passing freely along the highway. And where the defendant, being a lumber merchant, occupied a small yard close to the street, and was obliged to deposit pieces of lumber in the street, and to have them sawed there, before they could be carried into his yard; and this was suggested to be necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads into a cellar; it was said, “If an unreasonable time is occupied in delivering beer from a brewer’s dray into the cellar of a publican, it becomes a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant in this case is not to eke out the inconvenience of his own premises by taking in the public highway into his lumber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business.”¹

v. Russell, 6 East, 427. Or for a coachman to stand with his coach in any particular part of the street for an unreasonable time waiting for passengers: *Rex v. Cross*, 3 Camp. 224. Or for a man to erect a wharf on a river, although its erection might be beneficial, and sufficient room be left for a free passage in the river: *Respublica v. Caldwell*, 1 Dall. 150; *Hart v. Mayor*, 9 Wend. 571.

¹ *King v. Russell*, *supra*; *Rex v. Carlile*, 6 C. & P. 636; *Rex v. Jones*, 8 Camp. 230. In repairing a house, care must be taken that the encroachment on the highway be not unreasonable; for if the owner erect a shed so far out into the street as to encroach unreasonably on the highway, he will be liable for the nuisance, though if done by the servants of a contractor the owner is not liable. *Hilliard v. Richardson*, 8 Gray, 353. But building a house higher than it was before, whereby the street becomes darker, is not a public nuisance on account of the darkening only. *Rex v. Webb*, 1 Ld. Ray. 737. As to what encroachments upon a highway amount to a nuisance, see *Peckham v. Henderson*, 27 Barb. 207.

§ 202. **Causing Assembly in Street.** — A tenant will be responsible if he furnishes occasion, or does an act, which is likely to cause others to assemble around his premises, and produce an obstruction in the street. The defendants were accordingly held guilty of a nuisance, for causing the street in front of their distillery to be obstructed by carts and teams, remaining therein an unreasonable time, waiting for an opportunity of loading; although they used all reasonable diligence in the delivery and were in the pursuit of a lawful business. The fact that the team and carriages were not owned by the defendants, nor under their control, does not excuse them, if they, by the manner of conducting their business, invite such assemblages at the place where goods are delivered. And forasmuch as no length of time will enable a party to prescribe for a public nuisance, it was quite immaterial how long the practice had prevailed, or when the distillery was built.¹

§ 203. **May arise from Act in itself lawful.** — Every individual is entitled to the undisturbed possession and enjoyment of his own property; but this right is subject to an equal right in others to enjoy the possession of their property also. To this possession the law prohibits all direct injury without regard to its extent or the motives of the aggressor. One may therefore prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of his neighbors, even for a lawful purpose. He may make an excavation on his own land, but not so near that of another as to cause the land to give away; nor may he cast dirt or stones upon his neighbor's land, either by hand or the force of gunpowder. If he cannot construct his work without adopting means that will injure his neighbor, he must abandon that mode of using his property, or he will be held responsible for resulting damages,² although the work may be done in the most careful and skillful manner, or if a man negligently leaves noxious substances

¹ *People v. Cunningham*, 1 Den. 524.

² *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Same*, *id.* 163; *Aldred's Case*, 9 Co. 58; *Roll. Abr.* 565.

on his land which are washed by the rain along the surface of the ground into his neighbor's well, corrupting the water, he is liable for the injury; whether such substances are carried upon the surface of the ground, or have soaked into the soil and are carried along under the surface by the water diffusing itself according to natural laws.¹

§ 204. **Injury must be Actual and Substantial.** — It must not, however, be inferred that an action can be maintained for a thing which merely puts another to inconvenience. Actual damage must be sustained by the party complaining, to give him a standing in court; thus the mere act of diverting a watercourse, erecting a privy, or the like, is not sufficient to sustain an action, if it does no real injury to the plaintiff's inheritance or possession.² And the damage must be such as is apparent to an ordinary person; not such as can be perceived only by scientific or microscopic investigation.³ So the building of a wall which intercepts a prospect, without obstructing the light, or the opening of a window whereby the privacy of a neighbor is disturbed, are not *per se* actionable.⁴ And where a building having windows overlooking vacant premises owned by the lessor was demised, with the appurtenances, by a lease which contained only a covenant for quiet enjoyment, the lessee was held to have acquired no right against the lessor, or those claiming under him, to have the windows remain unobstructed for the passage

¹ *Brown v. Illius*, 27 Conn. 84.

² *Lansing v. Smith*, 8 Cow. 146; *Myers v. Malcomb*, *supra*; *Duncan v. Thwaites*, *supra*; *Mayor v. Henley*, 3 B. & Ad. 77; *Mills v. Hall*, 9 Wend. 315. Where the nuisance consisted in maintaining piles of wood on the street, constituting the bulkhead in front of the plaintiff's storehouse, injury to the rental of the storehouse is an injury which it suffers in common with all other property in the neighborhood, and will not be a cause of action. *Dougherty v. Bunting*, 1 Sandf. 1.

³ *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705.

⁴ Per Eyre, J., *Chandler v. Thompson*, 3 Camp. 82; *Cross v. Lewis*, 4 D. & R. 234; *Knowles v. Richardson*, 1 Mod. 55; *Aldred's Case*, 9 Co. 58. That a man has a right to build a fence on his ground for the purpose of shutting up the window of a neighbor, see *Pickard v. Collins*, 23 Barb. 444; *Mahan v. Brown*, 13 Wend. 261; *Parker v. Foote*, 19 *id.* 309.

of light and air, or for any other purpose.¹ The injury must not only be of a substantial nature, but must arise from some other cause than the mere caprice or peculiar physical constitution of the party aggrieved. And to render a business liable to be abated as a nuisance, it must be offensive and unhealthful to persons of ordinary nature and condition, and not merely to those of a delicate and sensitive organization. Thus the use of a warehouse for storing guano in the ordinary manner cannot be abated by showing that individual members of a family were nauseated by odors from it.² If the boughs of my tree grow over your land, you may cut them off; but you would not be justified in cutting them before they grow over your land, for fear they should grow over.³ And as was said, when a Chandler erects a melting-house, it is a common nuisance; but if a man is so tender-nosed that he cannot endure sea-coal, he ought to leave his house.⁴ Or if a man sets up a school so near my study, who am of the legal profession, that the noise interrupts my studies, no action lies.⁵

§ 205. **Reasonable Exercise of Lawful Right, though Harmful, does not constitute.** — Nor will an action lie for the reasonable use of a person's undoubted right although it may be to the annoyance of another; as, if a butcher or brewer exercises his trade in a convenient place.⁶ Nor was it held

¹ *Doyle v. Lord*, 4 Jones & S. 421.

² *Robinson v. Baugh*, 31 Mich. 290.

³ Per Coke, J., in *Norris v. Baker*, 1 Rolle, 394.

⁴ Per Doddridge, J., in *Jones v. Powell*, Palm. 586; *Hall v. Swift*, 6 Scott, 167; *Bower v. Hill*, 1 Bing. N. C. 549.

⁵ Com. Dig. Action on Case for a Nuisance. Noise caused by machinery having been acquiesced in for more than five years, the court refused to interfere on the ground of increased noise, no new machinery, or change in the manner of working, having been introduced. *Gaunt v. Fynney*, L. R. 8 Ch. 8. A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Boom v. Utica*, 2 Barb. 104. Neither is a billiard-table. *People v. Sergeant*, 8 Cow. 139.

⁶ *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hall*, 4 *id.* 183; *Flight v. Thomas*, 10 Ad. & E. 590. A tannery is not, *per se*, a nuisance. *State v. St. Com'rs of Trenton*, 36 N. J. 283.

actionable for a sportsman to keep six or seven pointers so near the plaintiff's dwelling-house that his family were prevented by their noise from sleeping during the night, and were much disturbed in the day.¹ So the erection of a mill above another mill, whereby the owner of the lower mill is obliged to extend his dam and is subjected to inconvenience in floating timber to his mill, but which does not affect his supply of water, is not actionable ;² although if, in such a case, the injury being trivial, the law will not afford redress, equity may interpose to prevent the lower mills being rendered useless or unproductive in any considerable degree.³

§ 206. *Diminution of Enjoyment of Easement constitutes.* — There must, as we have said, be some sensible abridgment of the enjoyment of the tenement to which an easement is attached, in order to amount to a disturbance, although it is not necessary there should be a total obstruction of the easement.⁴ Thus, to maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed so fully as before, or that the premises are, to a sensible degree, less fit for purposes of business or occupation.⁵ “The question is whether the plaintiff has the same enjoyment now which he used to have before, of light and air in the occupation of his house ; and whether the alteration, by carrying forward the wall to the height of ten feet, has or has not

¹ *Street v. Tugwell*, B. R. M. T., 41 Geo. III. But a dog in the habit of coming on a man's premises, barking and howling to the annoyance of his family, is a nuisance, and may be killed after reasonable notice to the owner. *Brill v. Flagler*, 23 Wend. 354.

² *Palmer v. Mulligan*, 3 Caines, 307 ; *Sackrider v. Beers*, 10 Johns. 241. Though a person has a right to erect a mill on his own ground where he pleases, yet he must so exercise that right as not to interfere with the existing rights of others ; and therefore if A. erects a new mill in such a place, or so near the mill of B., that an artificial dam, before erected by B., causes the water to flow back on A.'s mill and obstruct its movement, A. has no right to complain of B.'s dam as a nuisance. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

³ *Merritt v. Brinkerhoff*, 17 Johns. 306 ; *Stiles v. Hooker*, 7 Cow. 266.

⁴ *Moore v. Brown*, Dyer, 319, b, pl. 17.

⁵ *Cotterell v. Griffiths*, 4 Esp. 69. See § 309 *a*, *post*.

occasioned the injury which he complains of. It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears the defendants' premises had been injured by fire, and they re-erected them in a different manner from what they were before. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they shall make must not diminish the enjoyment by the plaintiff of light and air."¹

§ 207. *Prospective Injury, how prevented.* — But although some injury must have been sustained before redress can be had at law, yet if the necessary consequence of what has already been done will be an injury, it is not essential for a party to wait until actual damage shall have accrued, before proceeding to the appropriate remedy. For, if a person intending to build a house, which will obstruct my ancient lights, erects fences of timber for the purpose of building, I have no right to pull them down; but if the eaves of the house, when built, will evidently project over my land, I need not wait till water actually falls from them, but may pull them down at once, or may apply to a court of equity to prohibit the impending injury. But mere threats, unaccompanied by an act, do not amount to a disturbance.² Who are liable, and to whom, for a nuisance, we have already noticed.³ It does not appear to be necessary, in order to maintain an action for the continuance of a nuisance, that the defendant should have been requested to remove it.⁴ The damage need not be direct, in order to sustain an action; for the erection of a dam in a navigable stream, which obstructed the plaintiff's raft from passing, has been held sufficient for this purpose.⁵

¹ *Parker v. Smith*, 5 C. & P. 438; *Back v. Stacy*, 2 *id.* 465.

² *Baten's Case*, 9 Co. 54; 2 Roll. Abr. 145, Nuisance, V.

³ § 175, *ante*, and note.

⁴ *Wigford v. Gill*, Cro. El. 269; per Denio, J., in *Brown v. Cayuga R. R.*, 12 N. Y. 492. But see *McDonough v. Gilman*, 8 Allen, 264.

⁵ *Hughes v. Heiser*, 1 Binn. 468. Where a man purchased a lot front-

§ 208. **Prescriptive Right to do Injurious Acts.**—Does not apply to Public Nuisance.—Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as private nuisances, may be legalized by prescription. Thus the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but under an easement acquired by his neighbor, with twenty years' possession, a man may be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades.¹ So, with regard to flowing water, though the right to receive the stream in its accustomed course is an easement, yet the right not to have impure water discharged upon a man's land is one of the rights of property, the infringement of which can be justified only by an easement previously acquired by the party so discharging it. And an ancient user is held as between individuals to be a justification for the exercise of a noisy or offensive trade,² as well as for discharging impure water upon the adjoining land.³ But no length of time will legalize a public nuisance;⁴ nor is it material, that the premises injured by a private nuisance were erected after the nuisance was created,

ing on a river, for a dwelling-house lot, and covenanted not to use it for any offensive business nor for a stone quarry, nor to permit any nuisance to be erected thereon, it was held that leasing the land with the privilege of building a wharf and a railway across the land, for the purpose of drawing stone from a neighboring quarry to the wharf for transportation thence, which wharf also, from its propinquity to a large city, would invite nuisances, was a breach of the covenant, and should be restrained by injunction. *Seymour v. McDonald*, 4 Sandf. Ch. 502.

¹ *Bliss v. Hall*, 5 Scott, 500.

² *Elliotson v. Feetham*, 2 Bing. N. C. 134.

³ *Wright v. Williams*, 1 M. & W. 77.

⁴ *Stammers v. Dixon*, 7 East, 200. See the application of the common-law principle, *nullum tempus occurrit regi*, to the case of a public nuisance. *Dygert v. Schenck*, 23 Wend. 446. It is said in *Peckham v. Henderson*, 27 Barb. 207, that this rule does not apply to the case of a simple encroachment upon a highway, not amounting to an obstruction, or substantial annoyance to the public. See *Turner v. Ringw. H. Bd.*, L. R. 9 Eq. 418, *contra*.

for every continuance of it is a fresh nuisance.¹ Even public authority cannot legalize a nuisance by which a citizen is damaged; and therefore the erection of a permanent awning upon a sidewalk was held to be a nuisance which the court would enjoin at suit of an individual who sustains special injury therefrom, notwithstanding it had been licensed by the commissioner of public works.²

§ 209. **Equitable Power to restrain, when exercised.** — A court of equity will interpose by injunction to restrain an existing or threatened nuisance to property, if the injury be shown to be such as will materially diminish its value or seriously interfere with its comfortable enjoyment; especially if it appears that substantial damages could not be recovered in a suit at law.³ In the case of a private nuisance, however, the fact that the complainant had slept on his rights (in the case referred to for seven years) raised a strong, if not conclusive, presumption that the injury complained of was not of such a nature as to entitle him to obtain the aid of an injunction to restrain the nuisance.⁴ But a tenant who is aggrieved by a private nuisance, besides resorting to an action at law for damages, or applying to a court of equity

¹ *Brady v. Weeks*, 3 Barb. 157.

² *Trenor v. Jackson*, 46 How. Pr. R. 389. A work specially authorized by law cannot be a nuisance. *Hinchman v. Paterson* R. R., 17 N. J. Eq. 78.

³ *Catlin v. Valentine*, 9 Paige, 575; *Stetson v. Faxon*, 19 Pick. 147; *Penniman v. N. Y. Balance Co.*, 13 How. Pr. R. 40; *Mayor v. Curtis*, Clarke, Ch. 336; *Barrow v. Richards*, 8 Paige, 351; *Hamilton v. Whitridge*, 15 Md. 128; *Adams v. Michael*, 38 *id.* 128; *Curtis v. Winslow*, 38 Vt. 690. In *Crump v. Lambert*, 15 W. R. 417, Ld. Romilly, M. R., says, "The law on this subject is the same, whether it be enforced by an action at law, or by a bill in equity. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapors, or water, or any gas, or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement, any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupant of the neighboring tenement, or so as to injure his property. The real question in all the cases is one of fact, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

⁴ *Heiskell v. Gross*, 3 Brewst. 430.

for an injunction to prevent its erection,¹ may also enter and abate the nuisance, without resorting to legal process;² and trespass will not lie against him, either for the entry or the abatement, provided he has sustained special injury by it, and he commits no riot in doing it.³

§ 209 *a*. **Abatement of.** — A public nuisance may be abated by any one; a private nuisance by him whose property is injured.⁴ For its removal a party is liable only for the wanton or unnecessary injury he may cause; and the kind of property suffering detriment as well as other circumstances

¹ *Lansing v. Smith*, 4 Wend. 9. Common-law remedies for nuisance have become obsolete, and were never encouraged by our courts. *Kentz v. McNeal*, 1 Den. 436. And see *Brown v. Woodworth*, 5 Barb. 550; *Wagoner v. Jermaine*, 3 Den. 306. The court will not interfere by injunction to prevent or remove a nuisance, unless it has been erected in violation of a right which a man has long previously enjoyed: *Robeson v. Pittinger*, 2 N. J. Eq. 57, *Rhee v. Forsyth*, 37 Pa. St. 503; *Crenshaw v. State River Co.*, 6 Rand. 245; *Webb v. Portland Manuf. Co.*, 3 Sumn. 189; and there must be a strong case of pressing necessity, or the right must have been previously established at law: *Van Bergen v. Van Bergen*, 8 Johns. Ch. 282; *Gardner v. Newburgh*, 2 *id.* 164; *Att'y-Gen. v. Utica Ins. Co.*, *id.* 379. But if the thing is in itself a nuisance, and the plaintiff's right not doubtful, the court will interfere by interlocutory injunction. *Mohawk Br. Co. v. U. & S. R. R.*, 6 Paige, 554; *Huds. & D. Canal Co. v. N. Y. & E. R. R.*, 9 *id.* 323. It will not interpose if the nuisance has been acquiesced in, or encouraged by the party seeking relief: *Lenthard v. Morris Canal Co.*, 1 N. J. Eq. 518; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 847; *Saunders v. Smyth*, 3 Myl. & C. 711; *Lewis v. Chapman*, 8 Beav. 133; or if he consents to its erection, unless some injurious change is afterwards made in it: *Hulme v. Shreve*, 4 N. J. Eq. 116; or, if it merely contravenes the general or public policy: *Smith v. Lockwood*, 13 Barb. 209.

² *Gleason v. Gary*, 4 Conn. 418; *Kendrick v. Bartland*, 2 Mod. 253; *Raikes v. Townsend*, 2 Smith, 9; *Meeker v. Van Rensselaer*, 15 Wend. 397. The act of a plaintiff in abating a private nuisance does not bar him of damages; for the abatement is merely preventive. *Pierce v. Dart*, 7 Cow. 609. Nor does his assent to it take away his right afterwards to abate it if he think proper. *Pilchar v. Hart*, 1 Humph. 524.

³ *Wetmore v. Tracy*, 14 Wend. 250; *Baten's Case*, 9 Co. 54, b; *Colburn v. Richards*, 18 Mass. 420; *Fort Pl. Bridge Co. v. Smith*, 30 N. Y. 44; *Dougherty v. Bunting*, 1 Sandf. 1; *Harrower v. Ritson*, 37 Barb. 301.

⁴ *Arundell v. McCulloch*, 10 Mass. 70; *Wetmore v. Tracy*, 14 Wend. 250; *Lancaster T. Co. v. Rogers*, 2 Pa. St. 114.

attending the occurrence are to be taken into consideration in determining the damage. Where the nuisance complained of was the obstruction of a rivulet by a dam, so that the defendant's cattle could not obtain water so plentifully as before, the defendant was justified in entering upon the plaintiff's soil and removing the dam.¹ Lord Ellenborough said: "If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch. If he erects upon his own soil anything which is a nuisance to my house, mill, or land, I may remain on my own soil, or enter upon his, and throw it down, and justify this in an action of trespass. If he stops my way to my common, and encloses the common, I may justify the dejection of the enclosure of the common or way. And this I may still do if I have only an estate for years." But a man may not turn the water back on the land of the party who increases the natural flow of the stream by means of ditches.²

§ 210. **Reasonable Care to be used in Abatement of.** — In abating a private nuisance, a party is bound to use reasonable care that no more damage is done than is necessary to effect the purpose; and, so long as he complies with this rule, he will not be answerable for any resulting damage.³ As where a man erected a mill-dam partly upon his own land and partly upon adjoining land, and the owner of the adjoining land pulled down the portion of the dam standing upon his land, by reason of which all the dam fell down, the action of the latter was held justifiable.⁴ So if one erects a wall,

¹ *Raikes v. Townsend*, 2 Smith, 9. "If a man builds a house so near to mine that it stops my lights or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil, and pull it down, and for this reason only a small fine was set upon the defendant in an indictment for a riot, in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights." *Rex v. Rosewell*, 2 Salk. 459; and see *Bellows v. Sackett*, 15 Barb. 96.

² *Williams v. Gale*, 3 Har. & J. 231.

³ *Hicks v. Dorn*, 42 N. Y. 47; *Dyer v. Depui*, 5 Whart. 584; *Gates v. Blincoe*, 2 Dana, 158; *James v. Hayward*, W. Jones, 222.

⁴ 2 Rolle, Abr. Nusans (S).

partly upon his own land and partly upon the land of his neighbor, and the neighbor pulls down that part of the wall which projects over his land, and thereupon all the wall falls down, this is lawful.¹ But he may not abate more than is necessary, and therefore, where a plaintiff had a right to irrigate his meadow by placing a dam of loose stones across a stream, and occasionally a board and fender, and fastened the board with two stakes, which he had no right to do, the defendant was held justifiable in removing the stakes, but not in removing the board.²

§ 211. **Private Action for. — Damages. — Demand.** — The fact that a private nuisance is indictable as a public nuisance; or the continuance of a nuisance, as where it was created by the overflowing of lands by means of a mill-dam, for twenty years and upwards, though it constitutes no defence to a proceeding on the part of the public to abate it, will not prevent an individual from bringing an action against the party causing it, provided the plaintiff has sustained special injury thereby, distinct from what he suffers in common with the public.³ And the rule applies in favor of any person who suffers damage, whether direct or consequential, from a common nuisance.⁴ Nor will the abatement of a nuisance by a plaintiff preclude him from recovering damages sustained by himself prior to the abatement.⁵ No previous demand to remove the nuisance need be made before making such an abatement, except where the tenement on which the nuisance is erected has passed into other hands since its erection;⁶

¹ *Wigford v. Gill*, Cro. El. 269.

² *Greenalade v. Halliday*, 6 Bing. 379; *Williams v. Gale*, 3 Har. & J. 231.

³ *Chichester v. Lethbridge*, Willes, 73; *Crowder v. Tinkler*, 19 Ves. 621; *Mills v. Hall*, 9 Wend. 315; and see *Penruddock's Case*, 5 Co. 101.

⁴ *Lansing v. Smith*, 4 Wend. 9; *Cole v. Sproul*, 35 Me. 161; *Stetson v. Faxon*, 19 Pick. 147; *Harrison v. Sterett*, 4 Harr. & M. 540; *Gates v. Blincoe*, 2 Dana, 158.

⁵ *Gleason v. Gary*, 4 Conn. 418; *Pierce v. Dart*, *supra*.

⁶ *Wigford v. Gill*, *supra*; *Conhocton St. Rd. v. Buff. N. Y. & Erie R. R. Co.*, 51 N. Y. 573; when notice or knowledge of its existence must be shown.

and a demand may then be made, either on the lessor or lessee; for the continuance of it is, as we have seen, a nuisance by the lessee, against whom an action would also lie.¹

SECTION VI.

OF EASEMENTS.

§ 212. **In General, what.** — A tenant is entitled to the use of all those privileges, easements, and appurtenances in any way belonging to the premises under lease, as incident to his grant, unless they have been expressly reserved, and excepted out of the lease;² while he is, at the same time, bound to the performance of all such duties as have been lawfully imposed upon the land for the benefit of others, either by private agreement or by virtue of some regulation made by authority of the city or town within whose boundary he has located himself. As these duties and easements essentially affect the tenant's enjoyment of the premises, we shall notice the most important of them, with some of their modifications. Under the head of easements may be included all those privileges, which the public, or the occupants of neighboring lands, or tenements, have in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something on his own land, for the advantage of the public or of the person to whom the privilege belongs.³ Of these we may

¹ *Brent v. Haddon*, Cro. Jac. 555; *Gleason v. Gary*, *supra*.

² Thus the lease of a mill "just as it is," and with no conditions attached to the tenancy, carries with it the exclusive right to the use of the water which furnishes the motive power to the mill. *Moody v. King*, 75 Me. 497.

³ An easement is a privilege without profit, which one neighboring tenement hath of another, existing in respect of their several tenements; by which the servient owner is obliged to suffer, or not to do something on his land, for the advantage of the dominant owner. As to its essential qualities, it is incorporeal, although imposed upon corporeal property; confers no right to a participation in the profits arising from such property; is imposed for the benefit of corporeal property, and must exist

specify ways, commons, fisheries, watercourses, removal of buildings, and the right of support from neighboring soil, or from contract or prescription where the owner of a house stipulates to allow his neighbor to rest his timbers on the walls of his house; or the servitude of drip, by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate. Of the same description is the right of drain, or leave to convey water in pipes through or over the estate of another. These servitudes or easements can be created only by the owner of the servient tenement; and one tenant in common cannot establish them upon the common property without the consent of his cotenant. Their extent must be determined by the terms of the grant, or the nature of the enjoyment by which they were acquired; and if established by prescription, or to be inferred from user, they are limited to the actual user.¹ They may be limited to certain times; as the drawing of water from a neighbor's well at certain hours; or a right of passage to a portion of the day, or to a certain place. They are always to be distinguished from a mere license, or personal privilege of doing particular acts upon the land of another, which may or may not be conferred upon a tenant, or may be allowed to one tenant and withheld from another. An attempt to exercise such privileges without the owner's consent will subject the party to an action; and equity has jurisdiction to regulate, or restrain by injunction, any violation of rights established by grant or otherwise.²

between two distinct tenements,—the dominant, to which the right belongs, and the servient, upon which the obligation rests. *Termes de la Ley*; Gale & Whatley's Law of Easements. As an incorporeal hereditament, it passes with the dominant tenement by grant or succession; and the servient tenement is transmitted subject to the easement, in like manner. *Wolfe v. Frost*, 4 Sandf. Ch. 72. No one can be said to have an easement in his own land. *Huttemeier v. Albro*, 2 Bosw. 546.

¹ *Dixon v. Clow*, 24 Wend. 188; *Corning v. Gould*, 16 Wend. 531. A right claimed by user is only co-extensive with the user. *Brooks v. Curtis*, 4 Lans. 283.

² 3 Kent, Com. 436; *Seymour v. McDonald*, *supra*; *Brouwer v. Jones*, 23 Barb. 153. See the distinction between an easement and a license, § 237 a, *post*.

(a.) *Of a Right of Way.*

§ 213. **Defined.** — **Arises from Grant, express or implied, or from Necessity.** — A right of way is the right to use the surface of another's land for the purpose of passing and repassing; and it includes the incidental right to properly adapt the surface to that use, by levelling, gravelling, ploughing, or paving; while the owner of the soil retains all the rights and benefits of ownership consistent with the existence of the easement.¹ It may arise by a grant of the owner of the soil; by prescription, which supposes a grant, or from necessity. When claimed by grant, it can be created only by deed, although it may not be an interest in the land itself. It consists only in a right to pass in a particular line, and not to vary it at pleasure or to go in a different direction;² and, if granted for a particular purpose, it does not include a right of way for another purpose.³ If it be a right of way in gross, or a personal right, it is not assignable; and is exclusive, so that the owner of the right cannot take another person with him. But when the right is appendant, or annexed to the estate, it passes with the land to an occupant or assignee.⁴

§ 214. **From Necessity.** — **When Incident to a Grant.** — **Rights of Parties.** — A right of way from necessity arises when a man

¹ *Perley v. Chandler*, 6 Mass. 454; *Atkins v. Boardman*, 2 Met. 457. The owner of a right of way has a right to remove all obstructions placed in it. *Williams v. Safford*, 7 Barb. 309. The grantee of a private right of way, for his own accommodation, must keep it in repair. *Wynkoop v. Burger*, 12 Johns. 222.

² *Hewlins v. Shippam*, 5 B. & C. 221; *Jones v. Percival*, 5 Pick. 485.

³ *Cowling v. Higginson*, 4 M. & W. 245.

⁴ *Staple v. Heydon*, 2 Ld. Ray. 922; *Ackroyd v. Smith*, 10 C. B. 164. Under a lease of an alley, describing it as a lot of land, reserving a right of way to the grantor through it, it was held that the grantor was not bound to leave the whole alley open, but only enough to give an unobstructed right of way for the purposes reserved. *Jackson v. Allen*, 3 Cow. 220. It is no defence to an action for use and occupation, under a lease of a right of way, that others than the lessee have the same right, if such rights are not exclusive. *Ledyard v. Morey*, 54 Mich. 77.

leases or sells to another land which is wholly surrounded by his own land; and the lessee or purchaser in such case is entitled to a reasonable passage over the lessor's ground to arrive at his own land; for this is a necessary incident to the grant without which it would be useless.¹ It cannot be claimed by one who already has a way over his own ground, however inconvenient;² nor if there is a nearer and a better way than that which is claimed.³ The right of locating it belongs to the owner of the servient land; but it must be a convenient way.⁴ And after it has been once marked out, the grantee has no right to deviate from the course so designated; although the way may become impassable from being temporarily overflowed, or otherwise.⁵ There is, however, a temporary right of way over adjoining lands if the highway be out of repair, or otherwise impassable; but this principle applies only to public and not to private ways, for a person having a private way over another's land has no right to go upon the adjoining land, even although the private way be impassable.⁶

§ 214 *a*. **Liability of Owner of Servient Estate.** — As a general rule easements impose no personal obligation upon the

¹ *Doty v. Gorham*, 5 Pick. 487; *Holmes v. Seely*, 19 Wend. 507; *Alexander v. Tolleston Club*, 110 Ill. 65; *Powers v. Harlow*, 53 Mich. 507. Where a tenant acts at his own peril in accepting a lease of land to which there is no road, although some marks indicating such a road appear, no fraud as against the tenant is to be imputed to the landlord, in the absence of positive misrepresentation on his part. *Handrahan v. O'Regan*, 45 Iowa, 298.

² *McDonald v. Lindall*, 3 Rawle, 492. The lessee of one portion of a double business house cannot claim a right of access thereto through the other portion, where there are other means of access to the leased portion, and no provision for such right is made in the written lease. If such right of access were shown to be necessary to the proper use and enjoyment of the leased portion, the case might be different. *Ward v. Robertson*, 77 Iowa, 159.

³ *Jeter v. Mann*, 2 Hill (S. C.), 641.

⁴ *Russell v. Jackson*, 2 Pick. 574; *Capers v. Wilson*, 3 McCord, 170.

⁵ *Miller v. Bristol*, 12 Pick. 550; *Wynkoop v. Burger*, *supra*.

⁶ *Miller v. Bristol*, 12 Pick. 552; *Taylor v. Whitehead*, Doug. 745. If a man gives another a license to lay pipes of lead in his land to convey water to a cistern, he may enter on the land, and dig therein, to mend the pipes. *Pomfret v. Ricroft*, 1 Saund. 821.

owner of the servient tenement to do anything; and it is inferred, in the absence of a grant or contract, that he who enjoys the benefit of an easement must keep it in repair. So one over whose land another has a right of way may be liable to an action for obstructing the way, but not for suffering it to be out of repair, unless he is expressly bound by contract or by prescription to keep it in repair.¹ If he obstructs a way which he has once granted, the grantee may go *extra viam* over other of his land, and neither he nor a purchaser with notice from him will be allowed to obstruct the substituted mode of access, so long as the original obstruction exists.² The extent to which the owner of agricultural lands, subject to a right of way by the owners of the same description of lands, may obstruct or interfere with this by the use of gates and bars, is measured by the necessity of the erection of such obstructions for the protection of his other property; and the question is one of fact.³

§ 215. **Along Banks of Navigable Streams.** — The question has been much discussed whether a right of way, or path for towing vessels, exists along the banks of navigable rivers. It is said that, in those countries where the doctrines of the Roman law have been adopted, lands on either side of a navigable river, as well as on the seashore, have always been regarded as dependencies of the public domain, and subject to the servitude, or burden, of towing-paths, for the benefit of the public; but that no such right is recognized by English law.⁴ In New York, it has been held that the public have no right to use the land of an individual, adjoining navigable waters, as a public landing, or place of deposit of property in transit, against the will of the owner; notwithstanding

¹ Prescott v. White, 21 Pick. 342; Prescott v. Williams, 5 Met. 435; Doane v. Badger, 12 Mass. 69. The owner of the servient estate is bound to do no act to render the way unnecessarily dangerous. Thus a railroad company is bound to use reasonable care in running its trains over a way appurtenant to houses which it leases to its employees. McDermott v. N. Y. C. & H. R. R. Co., 28 Hun, 325.

² Selby v. Nettlefold, L. R. 9 Ch. 111.

³ Husen v. Young, 4 Lans. 68.

⁴ Ball v. Herbert, 8 T. R. 258.

such user may have been continued more than twenty years, with the knowledge of the owner.¹ Nor is the lessee of a wharf entitled, by virtue of his lease, to place structures on the pier which would materially encumber it, or interfere with its use for purposes connected with navigation, by the general public, however advantageous the erection might be to him. But it was held, in Missouri, that navigators and fishermen are entitled to the temporary use of the banks of navigable rivers, although owned by private individuals, for the purpose of landing and repairing their vessels, and exposing their sails and merchandise; but this only for transient purposes, and under restriction.²

§ 216. **For Special Uses, limited to such Uses.** — A right of way by prescription, for agricultural purposes, is a limited and qualified right and does not necessarily confer a right to use such way for general or commercial purposes; nor does a right of way for carriages necessarily include a way for cattle.³ A reservation, in a lease, of a right of way on foot for horses and cattle, does not give a right to carry manure;⁴ for a right of way to a close for some purposes cannot be enlarged to include others.⁵ The extent of this

¹ *Pearsall v. Post*, 20 Wend. 111; s. c. 22 *id.* 245; *Comm'rs v. Clark*, 83 N. Y. 251. This case also holds that the lease of a wharf from a city does not confer on the lessee an exclusive right to the possession, use, or control of the wharf. So far as it is used by his own vessels, he pays no wharfage; and so far as it is made use of by other persons, he, as the grantee of the city, succeeds to its rights in respect to wharfage. It is, notwithstanding, a public wharf, and vessels resorting to it, whether those of the lessee or of others, are subject to the rules regulating the use of wharves, and the mooring and stationing of vessels.

² *O'Fallon v. Daggett*, 4 Mo. 343. There is nothing inconsistent with the purposes of a sea or river wall, or embankment, in a right of way along the surface thereof; and the same evidence of user will raise a presumption of a dedication of such a right of way, in the case of such an embankment, as in any other case of uninterrupted and open user by the public. *Greenw. Bd. v. Maudsley*, L. R. 5 Q. B. 397.

³ *Jackson v. Stacy*, Holt, N. P. C. 455; *Ballard v. Dyson*, 1 Taunt. 279; *Kirkham v. Sharp*, 1 Whart. 323.

⁴ *Brunton v. Hall*, 1 Gale & D. 207.

⁵ *Comstock v. Van Duesen*, 5 Pick. 163; *Webster v. Bach*, 1 Freem. 247.

right is always a question of fact.¹ As a general rule, where there is a license to use a certain way, there must be a reasonable use of it; as, if a man let a house, reserving a right of way through it, he cannot go through without request nor at unseasonable hours.² Twenty years' uninterrupted user is sufficient to raise a presumption of a grant of a right of way, provided the user is adverse, and not permissive.³ But the erection of a gate at the time a way is opened, or the open declarations of the owner at such time, contradictory of the right, will rebut the presumption of the grant of a common way.⁴ The extent of the right is limited by the ordinary mode of user, unless a grant be shown, in which case it will be confined to the terms of the instrument, not having been adverse thereto.⁵

§ 217. *When defeated by Non-user or uniting Possession.*—From long forbearance to exercise a right of way, a release of it may be presumed; but when the right can only be acquired by twenty years' enjoyment, it cannot be lost by disuse for a shorter period.⁶ Unity of possession of the close where a private way exists with the close to which the way is appurtenant, or which gives the right of way, may work an extinction of the same; as, if a man have a way over the close of another, and he purchases that close.⁷ But this is to be understood of a mere way of easement; for if it be a way of necessity, it will not be extinguished by such a unity of possession; nor unless the necessity has ceased.⁸ And if it be a prescriptive easement, mere unity of possession merely suspends the right; it requires a unity of ownership to

¹ *Cowling v. Higginson*, 4 M. & W. 245.

² *Tomlin v. Fuller*, 1 Vent. 48.

³ *Maverick v. Austin*, 1 Bail. 59; *Gayetty v. Bethune*, 14 Mass. 53; *Turnbull v. Rivers*, 3 McCord, 181.

⁴ *Commonwealth v. Newbury*, 2 Pick. 51; *Barker v. Clark*, 4 N. H. 384.

⁵ *Hart v. Chalker*, 5 Conn. 816; *Atkins v. Boardman*, 20 Pick. 291.

⁶ *Wright v. Freeman*, 5 Har. & J. 476; *Emerson v. Wiley*, 10 Pick. 816; *White v. Crawford*, 10 Mass. 189. See also *Miller v. Garlock*, 8 Barb. 153.

⁷ *Dyer*, 295; *Sury v. Pigott*, Palm. 446; s. c. 3 Bulst. 340.

⁸ *Grant v. Chase*, 17 Mass. 448; *McDonald v. Lindall*, 3 Rawle, 495.

destroy it.¹ Therefore, where a party seised in fee of certain premises took a lease of the adjoining land, the owner of which had previously enjoyed an easement in the former, such unity of possession was held to suspend, but not to extinguish, the right of way over the former.²

(b.) *Of Commons.*

§ 218. **Defined. — Right of, exists in New York.** — The term commons is used to denote that right or privilege which one or more persons have to take or use some portion of that which another person's lands, woods, or waters produce, in order to provide pasture for his cattle, fuel for his family, or means of repairing his houses, fences, and implements of husbandry. It was originally designed to encourage agriculture, and generally commenced in some agreement between lords of manors and their tenants; but, being continued by usage, it became valid without an instrument in writing to prove the original grant. The most general kind of common is that of pasture, or the right of feeding one's beasts on another's lands. The policy of the old law, however, in favor of common of pasture and of estovers, has changed or become obsolete, and the right itself is scarcely recognized in this country.³ It probably does not exist in any of the States except New York, where it has been the subject of litigation; resulting, substantially, in the adoption of the principle of English law, that where the right of common of pasture has once been established, the right of the owner of the soil to improve the residue of his waste lands must be exercised consistently with the reservation of the right of common.⁴

¹ *Manning v. Smith*, 6 Conn. 289; *Canham v. Fisk*, 2 Tyrw. 155.

² *Thomas v. Thomas*, 2 Cr. M. & R. 84.

³ *Trustees v. Robinson*, 12 S. & R. 88.

⁴ *Watts v. Coffin*, 11 Johns. 495. A custom that all the inhabitants of a particular town, for the time being, have the right to depasture the unenclosed woodlands of individual proprietors within the town, is not a mere easement, like a right of way; it is a right to take a profit; and for such a right, the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom therefore is void. *Smith*

§ 219. **Appendant or Appurtenant. — Of Pastures and Estovers.**
— Common of pasture is either appendant or appurtenant. The first is founded on prescription, and is regularly annexed to arable land. It authorizes the tenant to put commonable beasts upon the waste grounds of the manor, but such beasts must be *levant* and *couchant* on the estate; that is, such cattle only as are necessary to plough and manure the land, and so many as the land will sustain during the winter. Common appurtenant may be annexed to any kind of land, and may be created by grant as well as by prescription. It allows the occupant to put in other beasts than such as plough or manure the land; and, not being founded on necessity, like the other right as to commonable beasts, was never favored in law.¹ Common of pasture, whether appendant or appurtenant, may be apportioned; for, as the land is entitled to common only for such cattle as are necessary to plough and manure it, the common cannot of course be surcharged by any number of divisions or subdivisions in consequence of alienation. Such common, therefore, being incident to the land, passes with it in such proportions as the land may be divided into.² But common of estovers is not apportionable: for if this were to be allowed, the land might be surcharged; as if, for instance, estovers are granted to a farm of two hundred acres, so long as this is one farm there is but one house to be supplied, and, perhaps, not more than two chimneys; but, if the farm is divided, and another house becomes necessary, double the number of chimneys must be supplied, which would be injurious to the inheritance if it were to be allowed.³ So, also, with respect to fences and buildings; upon a division of the farm, more fences and buildings become necessary, and if both are to be supplied from the woods of the proprietor, an increased quantity would be taken, when by the grant itself only estovers for one farm were intended.

v. Floyd, 18 Barb. 522; *Pearsall v. Post*, 20 Wend. 111; 22 *id.* 425; *Grimstead v. Marlowe*, 4 T. R. 717; *Gateward's Case*, 6 Co. 59, b.

¹ *Van Rensselaer v. Radcliff*, 10 Wend. 639.

² *Livingston v. Tenbroeck*, 16 Johns. 26; *Bennet v. Reeve*, Willes, 227.

³ *Livingston v. Ketcham*, 1 Barb. 592.

§ 220. **Estovers a Joint Right, and not Apportionable.**— Since estovers cannot be apportioned, neither of the tenants, in case of the division of a farm among themselves, can have them. They belong to the farm as an entirety, and not to parts of it; and as the owner of no one portion can enjoy the right, it is necessarily extinguished, and can be revived only by a new grant.¹ And if common of estovers devolves upon several by operation of law, as by descent, they cannot enjoy the right in severalty; although they may unite in a conveyance, and vest the right in one individual. It is a joint right, and is to be enjoyed by the heirs or their assigns jointly, on the principle that the land charged with the right ought not to have an increase of burden by the multiplication of claimants.² If a stranger, who has no right to its enjoyment, puts his cattle upon the common, the landlord may distrain them damage-feasant or have his remedy by action of trespass; and the commoner may, in like manner, distrain, or sue for damages by an action on the case.³ If a commoner surcharge the common, the landlord may distrain the extra beasts, or bring trespass, while the other commoners may have an action on the case.⁴

(c.) *Of Fisheries.*

§ 221. **General or Private, defined.**— A common of fishery is of two kinds: the one, a right of fishing common to all; and the other, a right vested exclusively in one or a few individuals. By the common law, owners of land on the banks of fresh-water rivers, above the ebbing and flowing of the tide, have the exclusive right of fishing, as well as the

¹ Van Rensselaer v. Radcliff, 10 Wend. 649; Corning v. Gould, 16 Wend. 531.

² Leyman v. Abeel, 16 Johns. 30. A tenant entitled to estovers in the unappropriated lands of a manor, may, if the landlord seeks to deprive him of his right by leases of the adjoining common lands, resort to more distant parts, though they are more valuable. Van Rensselaer v. Brice, 4 Paige, 174. Firebote cannot be claimed for an under-tenant. Sarles v. Sarles, 3 Sandf. Ch. 601.

³ Cheesman v. Hardham, 1 B. & A. 706; Ricketts v. Salwey, 2 id. 360.

⁴ Bowen v. Jenkins, 6 Ad. & E. 911.

right of property opposite to their respective lands *ad filum medium aquæ*. And where the lands on each side of the river belong to the same person, he has the same exclusive right of fishery in the whole river, so far as his lands extend along the same. But such right is always subject to the public convenience; and all erections or impediments made by the owners, so as to obstruct the free use of a river, as a highway for boats or rafts, are nuisances.¹ So far as regards rivers not navigable (and, in the common-law sense of the term, those only are deemed navigable in which the tide ebbs and flows), an exclusive right of fishery may be established by proof of a grant or prescription,² but it is subject to the qualification that it cannot be so used as to injure private rights of others; nor extend so far as to impede the passage of fish up the river, by dams or other obstructions.³

§ 222. **In Navigable Waters a Public Right. — Alter in Streams not Navigable, unless by Prescription.** — The private right of fishery is confined to fresh-water rivers, above tide-water, unless a special grant or prescription is shown; but the right of fishing in the sea, or in a bay or arm of the sea, and also in navigable or tide waters, is a public right and common to every one; and no individual can appropriate to himself an exclusive privilege in navigable waters, or in an arm of the sea, without showing a grant or prescription for the same.⁴ But no person has a right to go over another man's land for the purpose of fishing, or to cross the grounds of an individual lying upon the beach or seashore, on foot, or otherwise,

¹ Hooker v. Cummings, 20 Johns. 90.

² Gould v. James, 6 Cow. 369; Brookhaven v. Strong, 1 S. C. 415; Rogers v. Jones, 1 Wend. 237.

³ People v. Platt, 17 Johns. 195; Jennings, *Ex parte*, 6 Cow. 518; Comm'rs v. Kempshall, 26 Wend. 404; People v. Tibbets, 19 N. Y. 523; Berry v. Carle, 3 Greenl. 269; Scott v. Willson, 3 N. H. 321; Commonwealth v. Charlestown, 1 Pick. 180; Adams v. Pease, 2 Conn. 48; Browne v. Kennedy, 5 Har. & J. 195.

⁴ Arnold v. Mundy, 1 Halst. 1; Martin v. Waddell, 16 Pet. 400; Parker v. Cutler Man. Co., 20 Me. 353; Carter v. Murcot, 4 Burr. 2162; Mayor v. Richardson, 4 T. R. 437; of Gould v. Hud. River R. R. 6 N. Y. 522.

in order to bathe in the sea, as against the owner of the soil of the shore.¹ The several States have assumed the regulation of the passage and protection of fish, in streams not navigable. And it is now considered that fisheries are, as at common law, the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute; and that the right, unless secured by a particular grant or prescription, is held subject to legislative control.² But by force of a grant, or by prescription, a person may have an exclusive right of fishery, even in an arm of the sea, or in a navigable river, where the tide ebbs and flows. Thus, a patent to the inhabitants of a town, conveying all lands under water within the bounds of the grant, together with the exclusive right of fishing in the waters of the same, confers this right as the common property of the town, and may be regulated by rules adopted at the town-meeting.³

§ 223. **Rights of Abutters on Navigable Waters.** — Although the right of fishing in a navigable river is a common right, the adjoining proprietors have the exclusive right to draw seines and take fish on their own land; and if an island or a rock in tide-waters be private property, no one but the owner has the right to use it for fishing.⁴ In Pennsylvania the doctrine which holds no rivers to be navigable, so as to confer the common right of fishery, except those where the tide ebbs and flows, is held not applicable to the great rivers of that State; and the owners of land on the banks of such rivers as the Delaware and Susquehanna, so far as they are common highways, have no exclusive right of fishing opposite their respective lands.⁵ A similar exception to the com-

¹ *Blundell v. Catteral*, 5 B. & A. 268. A right of fishing in any water gives no power to erect huts on the land for that purpose. *Cortelyou v. Van Brundt*, 2 Johns. 357.

² *Stoughton v. Baker*, 4 Mass. 527; *Nickerson v. Brackett*, 10 *id.* 212; *Waters v. Lilley*, 4 Pick. 145; *Vinton v. Welsh*, 9 *id.* 87; *Cottrill v. Myrick*, 3 Fairf. 222; *Lunt v. Hunter*, 16 Me. 1.

³ *Rogers v. Jones*, 1 Wend. 237.

⁴ *Lay v. King*, 5 Day. 72; *Commonwealth v. Shaw*, 14 S. & R. 9.

⁵ *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71.

mon-law rule has been suggested to exist in North and South Carolina, and probably in other States.¹ The property which the law gives in river-fish uncaught, is of that kind which is called special or qualified property, and is derived out of the right to the place or soil where such fish live: a man has a special property in them so long as they are upon his land or in the water which flows over it; but loses such property when they resort to the water of another. But, if one plants a bed of oysters, even in a bay or an arm of the sea, and marks it out by stakes, this is held to be no interference with the common right of fishing in such bay, and he acquires a qualified property in such oysters, sufficient to enable him to maintain trespass for its protection.²

(d.) *Watercourses.*

§ 224. **Natural Rights of Owner of the Soil in.** — With respect to the use of water, every proprietor of land through which a natural stream of water flows, has a right to the advantages of the stream flowing in its natural course, and to use it for any reasonable purpose not inconsistent with a similar right in the proprietors above and below. He may detain it, by means of a dam, long enough for a profitable enjoyment of it; and is entitled to have the whole of it pass through his land, though he may not require it for the use of machinery.³ But if, after having applied it to some purpose of utility, he is interrupted in doing so by a diversion of the water, he has no right of action against the person diverting it unless he has had an exclusive occupation for a sufficient

¹ *Ex'ors v. Waddington*, 1 McCord, 580; *Collins v. Benbury*, 3 Ired. 277.

² *Fleet v. Hegeman*, 14 Wend. 42.

³ *Crooker v. Bragg*, 10 Wend. 260; *Van Hoesen v. Coventry*, 10 Barb. 518; *Holden v. Lake Co.*, 53 N. H. 552; *Bealey v. Shaw*, 6 East, 208. Where hydraulic privileges are created by conducting a stream across lands in an artificial channel, the proprietors of lots crossed by it, in the absence of any stipulation to the contrary, have the same rights to the use of the water on their respective lots as between themselves, as would exist if the artificial were the natural channel of the stream. *Townsend v. McDonald*, 12 N. Y. 381.

length of time to raise a presumption of a grant to use it to the detriment of others.¹ He has no absolute property in the water, and therefore he cannot, without the consent of other proprietors, divert or diminish the quantity of water which would otherwise descend to the proprietor below,² or throw it upon the proprietor above, without a grant or an uninterrupted enjoyment for twenty years, which is equivalent to a grant.³ And where a spring of water rises upon the land of one, and from it flows a stream to the land of

¹ *Mason v. Hill*, 5 B. & Ad. 23; *Frankum v. Falmouth*, 6 C. & P. 529; *Hatch v. Dwight*, 17 Mass. 289; *Strickler v. Todd*, 10 S. & R. 63; *Hazard v. Robinson*, 3 Mason, 272. And see *Platt v. Johnson*, 15 Johns. 213; *Merritt v. Brinkerhoff*, 17 *id.* 306.

² *Marshall v. Peters*, 12 How. Pr. R. 218. Nor can he appropriate the ice formed therein to his own exclusive use. In *W. Roxbury v. Stoddard*, 7 Allen, 158, an action was brought against persons who cut ice from a pond, the fee of the land under which was vested in a town, for public uses. It was held that fishing, fowling, boating, bathing, skating, or riding upon the ice, taking water for domestic or agricultural purposes, or for use in the arts, and the cutting and taking of ice, are lawful and free upon public ponds, to all persons who own land adjoining them, or can obtain access without trespass, so far as they do not interfere with the reasonable use of the pond by others, or where the legislature has not otherwise directed; that the town had no such property in the ice on the pond as would enable it to maintain an action, even if the fee of the pond be considered to be in the town; and that the remedy for any unreasonable or excessive use of the liberty of cutting ice, being the violation of a public right, is by indictment; and that the towns may regulate the use of the ponds by reasonable by-laws. That ice, after it has been stored for domestic use, may be property, see *Ward v. People*, 6 Hill, 144. In *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, it was held that a lessee of riparian rights on a navigable stream might enclose and store ice for his own use and profit, within the limits embraced in his lease, so long as he did not thereby interfere with the navigation or proper use of the stream.

³ *Belknap v. Trimble*, 3 Paige, 577; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Belknap v. Belknap*, *id.* 463; *Merritt v. Parker*, 1 Coxe, 460; *Dumont v. Kellogg*, 29 Mich. 420; *Bucklin v. Truell*, 54 N. H. 122; *Wright v. Howard*, 1 Sim. & S. 190; *Bealey v. Shaw*, *supra*; *Magor v. Chadwick*, 11 Ad. & E. 571. Even for the purpose of repairing his own mill. *Van Hoesen v. Coventry*, *supra*. Nor can he justify a diversion on the ground that if the other party would make a better dam, there would still be left enough water to supply his mill. *Crooker v. Bragg*, 10 Wend. 260.

another, the owner of the land where the spring rises has no right to divert the stream from its natural channel; although its waters are not more than sufficient for his domestic uses, his cattle, and the irrigation of his land.¹ To establish a right to a watercourse, it must appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides; it need not flow continually, and may at times be dry, but it must have a well-defined and substantial existence.² A riparian proprietor cannot erect a dam above the mill of another, by which the water is diverted from its accustomed channel so as to affect the regularity of the supply, though there is no waste of water and notwithstanding it may be returned to its ordinary channel before it reaches the other's mill.³ Nor, unless he has acquired such a right by prescription, will he be permitted to corrupt a running stream of water to the prejudice of his neighbor.⁴

§ 225. **Rights in, not to be used Unreasonably or Injuriously.**—Supposing a person to have acquired a certain exclusive right to the enjoyment of water, he will not be permitted to make use of that right in an unreasonable manner, so as sensibly to affect the application of it by his neighbors below on the stream; as by shutting the gates of his dams, detain-

¹ *Arnold v. Foot*, 12 Wend. 330. And after having changed the natural flow of the water, and continued such change for twenty years, he will not be permitted to restore it to its natural state, to the prejudice of mills which have been erected with reference to such change. *Belknap v. Trimble*, *supra*.

² *Wagner v. L. I. R. R.*, 2 Hun, 633; *Barnes v. Sabron*, 10 Nev. 217. It does not include mere occasional flows of surface-water. *Eulrich v. Richter*, 37 Wis. 226.

³ *Sackrider v. Beers*, 10 Johns. 241; *Shears v. Wood*, 7 Moore, 345; *Mason v. Hill*, 5 B. & Ad. 1; *Wright v. Howard*, *supra*; *Hammond v. Fuller*, 1 Paige, 197.

⁴ *Howell v. McCoy*, 3 Rawle, 269; *Thomas v. Brackney*, 17 Barb. 654; *Carhart v. Aub. Gas Co.*, 22 *id.* 297, as, by rendering it unwholesome for cattle. *Gladfelter v. Walker*, 40 Md. 1; *Richm. Man. Co. v. Atlantic D. Co.*, 10 R. I. 106. The grant of an undivided share of a stream does not authorize its use, to the injury of others jointly interested in it. The property in a stream of water is indivisible; and it must be used as an entire stream in its natural channel. *Vandenburgh v. Van Bergen*, 13 Johns. 212.

ing the water unreasonably, and then letting it off in unusual quantities, to the annoyance of his neighbor.¹ Nor has he a right by the erection of a dam to create a reservoir for the storage of water for future use in a dry season, though no special injury may be sustained by an adjoining proprietor.² Neither can he divert the water into artificial channels for purposes of irrigation, to an unreasonable extent or so as to materially diminish the quantity that has been accustomed to flow to other riparian proprietors.³ And, in general, it may be said that, where two or more persons are entitled to a common use of water, the upper proprietor will be answerable for damages if he does not afford the lower one a fair and reasonable participation in its use;⁴ but no action can be sustained by one riparian proprietor against another for erecting a dam on a stream, whereby the water is raised along the plaintiff's land above its natural level, without proof of special damage.⁵

§ 226. **Right to accumulate and store Water.** — It has generally been held that if an owner builds a dam upon his own premises, and thus holds back and accumulates water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or reservoir give way and the lands of a neighbor are thus flooded, he is not liable for damage without proof of fault or negligence on his part.⁶ Thus

¹ *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Beissell v. Sholl*, 4 Dall. 211; *Colburn v. Richards*, 13 Mass. 420; *Runnels v. Bullen*, 2 N. H. 532.

² *Clinton v. Myers*, 46 N. Y. 511. Such a proprietor may insist on his legal rights without regard to the question of damages. *Ibid.*

³ *Cook v. Hull*, 3 Pick. 269, explaining *Weston v. Alden*, 8 Mass. 136; *Union Mills Co. v. Ferris*, 2 Sawyer, 176.

⁴ *Merritt v. Brinkerhoff*, 17 Johns. 306; *Pollitt v. Long*, 56 N. Y. 200. Mere inconvenience in his business is not a cause of action, if the interception of the water does not extend to the diminution of the uses of the plaintiff's mill: *Palmer v. Mulligan*, 3 Caines, 307; *Thompson v. Crocker*, 9 Pick. 59.

⁵ *Garrett v. McKie*, 1 Rich. 444.

⁶ *Lapham v. Curtis*, 5 Vt. 371; *Shrewsbury v. Smith*, 12 Cush. 177; *Bailey v. Mayor*, 8 Hill, 531; s. c. 2 Den. 433; *Pixley v. Clark*, 35 N. Y. 520; *Sheldon v. Sherman*, 42 *id.* 484.

where one built a mill-dam upon a proper model, and the work was well done, he was held not liable to an action though it broke away, in consequence of which his neighbor's dam and mill below were destroyed; and that negligence must be shown either in the construction of the dam or in not keeping it in repair to render him liable.¹ But it has been held in England that a man, merely by bringing upon his land an artificial body of water, is liable for any injury its escape may cause, though there is no negligence on his part; and this doctrine has been approved in some States.² Where a dam is erected upon an ancient stream to obtain a head of water for the use of one of the State canals, the surplus waters of the stream which are not wanted for public use, and which continue to flow over the dam and down the ancient channel, belong to the owners of water-rights upon the margin of the stream below, in the same manner as if the State dam had not been erected; and a lessee of the surplus waters of the canal cannot divert them to the injury of the proprietors of mill-privileges on the stream below. No person, however, except by authority of the State, has a right to tap the State dam and draw off the surplus waters of the artificial pond, which is created by such a dam for public purposes.³

§ 227. **Right to Injurious Enjoyment may arise by Grant or Prescription, but not otherwise.** — The right to the enjoyment of this easement, like that of any other, may be controlled by a grant, or by prescription, which supposes a grant; for though the stream be diminished in quantity, or injured by the exercise of certain trades, yet if the party using it has enjoyed his occupation in a similar way for twenty years, he has acquired a prescriptive right to such use, and the party

¹ *Livingston v. Adams*, 8 Cow. 175.

² *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Shipley v. Fifty Assoc.*, 101 Mass. 251. But it is held, distinguishing the case from *Rylands v. Fletcher*, *supra*, where the water is brought upon the premises for the benefit of tenants, that the landlord, in case of resulting injury to one tenant, is not liable to such tenant as for a breach of the covenant for quiet enjoyment. *Anderson v. Oppenheimer*, 5 Q. B. D. 602.

³ *Varick v. Smith*, 5 Paige, 137.

below must take the stream subject to the adverse right.¹ Subject to this restriction, however, the owner of an ancient mill may lawfully enter the close of another and remove a dam erected thereon by which the water of the stream below his mill is made to flow back and prevent it from working.² So he may enter upon the land of a riparian owner, above his mill, and remove a dam unlawfully erected there to irrigate the latter's land, the stream being thereby stopped to such an extent as to render the mill below useless.³ And if a mill-dam across an unnavigable stream is so erected or managed as to become prejudicial to the health or comfort of others, it becomes a nuisance.⁴ Equity will prohibit by injunction the obstruction of watercourses, diversion of streams from mills, back-flowage upon them, and other like injuries which from their nature cannot be adequately compensated at law.⁵

§ 228. **Prescriptive Right, how acquired.**— But it is not necessary that the person claiming the prescriptive right should have exercised it in precisely the same manner during the whole time of its enjoyment, or that the water should have been used to propel the same machinery; if the manner of user shall not have been materially varied to the prejudice of others. Therefore, if a proprietor at the head of a stream has changed the natural flow of the water, and continued the change for more than twenty years, he cannot afterwards be permitted to restore it to its natural state when it would have the effect of destroying mills below which had been

¹ *Campbell v. Smith*, 3 Halst. 139; *Cooper v. Smith*, 9 S. & R. 26; *Sherwood v. Burr*, 4 Day, 244; *Brown v. Best*, 1 Wils. 174; *Barker v. Richardson*, 4 B. & A. 579; *Cross v. Lewis*, 2 B. & C. 686; *Livett v. Wilson*, 3 Bing. 115. And the right does not relate to the purpose for which the water is to be used, but to the manner and extent of the diversion. *Smith v. Adams*, 6 Paige, 435; *Belknap v. Trimble*, *supra*.

² *Hodges v. Raymond*, 9 Mass. 316.

³ *Colburn v. Richards*, 13 Mass. 420. And see *Curtis v. Jackson*, *id.* 507; *Sumner v. Tileston*, 7 Pick. 198.

⁴ *State v. Close*, 35 Iowa, 570.

⁵ *Sanborn v. Covington Co.*, 2 Md. Ch. 409; *Bemis v. Upham*, 13 Pick. 169.

erected in reference to such change in the natural flow of the stream.¹ And if one has had the use of water at a given height for twenty years, a grant will be presumed of the privilege of using it at that height only; and if he repairs his dam, so as to raise the water higher and cause it to flow back upon his neighbor's mill, he is liable, although the dam itself may remain at its ancient height; for the question being not as to the height of the dam, but of the water.²

§ 229. **Streams as Boundaries. — Rights of Abutters. —** A grant of land, bounded upon a tideless stream, carries the right of the grantee to the middle of the stream, unless the language is such as to clearly show the intent of the parties that it should not extend beyond the water's edge. If the stream is navigable either for boats or rafts, the public has a right to use it for those purposes, and the rights of the adjoining proprietors are subject to the public easement,³ but they cannot erect dams, or place other obstructions in the stream, which will interfere with its free and convenient use for public purposes. Nor can the State divert the water of

¹ 3 Kent, Com. 442; *Belknap v. Trimble*, *supra*; *Blanchard v. Baker*, 8 Greenl. 253; *Hazard v. Robinson*, 3 Mason, 272.

² *Stiles v. Hooker*, 7 Cow. 266. The mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him, or confer any right upon the adjoining proprietors. *Townsend v. McDonald*, 12 N. Y. 381; *Crooker v. Bragg*, *supra*; *Bealey v. Shaw*, 6 East, 208. And the constant use of a stream, for the purposes of a mill, does not deprive the proprietor above of the right to make a reasonable use of the waters for like purposes, although he may thereby disturb the natural flow of water to the lower mill. *Thurber v. Martin*, 2 Gray, 394. And see *Chandler v. Howland*, 7 Gray, 348, 350; *Smith v. Agawam Canal Co.*, 2 Allen, 355, 357.

³ *Adams v. Pease*, 6 Conn. 481; *Claremont v. Carlton*, 2 N. H. 369; *King v. King*, 7 Mass. 496; *Hay v. Bowman*, 1 Rand, 417; *Berry v. Carle*, 8 Greenl. 269; *Morrison v. Keen*, *id.* 474; *Ingraham v. Wilkinson*, 4 Pick. 268; *Arnold v. Mundy*, 1 Halst. 1; *Gavit v. Chambers*, 3 Ohio, 495; *Brown v. Kennedy*, 5 Har. & J. 195; *People v. Seymour*, 6 Cow. 579; *Hooker v. Cummings*, 20 Johns. 90; *Marsh v. McNider*, 88 Iowa, 390. Rivers of sufficient capacity to float to market the products of the country are public highways. 3 Kent, Com. 411; *Browne v. Schofield*, 8 Barb. 239. A river is deemed navigable, as far as the tide rises and falls, though the water be fresh. *People v. Tibbets*, 19 N. Y. 523.

the stream, or interfere with it in any other manner that will render it less useful to the proprietors of the adjacent shores, without making compensation.¹ A prescriptive right to a public towing-path on the bank of a navigable river is not destroyed by an act of the legislature which converts that part of the river adjoining a towing-path into a floating harbor; and if either the water, or the improvement, impairs the facility of passing along the bank, the public have a reasonable way over the nearest part of the next field.²

§ 230. **No Prescriptive Right in Subterranean Waters.** — It has been questioned whether the right to the enjoyment of an underground spring, or of a well supplied by such a spring, was governed by the rule which regulates watercourses flowing on the surface. But in an action for damage sustained by the loss of water from a well, in the plaintiff's close, occasioned by the defendant's digging a coal-pit three-quarters of a mile off,—the well having been constructed for twenty years, and used for working a cotton-mill, *Tindal, C. J.*, after stating that the rule which governs the case of streams running in their natural courses either assumes for its foundation the implied assent and agreement of the proprietors of the different lands, or may be considered as a rule of positive law, concludes that there can be no ground for inferring any mutual agreement for ages past, between the owners of the several lands beneath which underground springs exist, and so that no trace of positive law could be inferred from long-continued acquiescence; and that, therefore, the case did not fall within the rule which obtains, as to surface streams, but rather within that which gives to the owner of the soil all that lies beneath its surface; the damage occasioned by the exercise of such a right

¹ *People v. Canal App.*, 13 Wend. 355; *Ex parte Jennings*, 6 Cow. 548.

² *Ball v. Herbert*, 3 T. R. 253; *Rex v. Tippet*, 3 B. & A. 193. Persons navigating public waters may use docks erected upon them, without the owner's express permission; and the owner of a dock cannot set the vessel adrift so as to endanger its safety, until after request to remove, and neglect to do so in reasonable time. *Heeney v. Heeney*, 2 Den. 625.

being *absque injuria*.¹ And in Maine it was held that one who digs a well on his own land, in good faith, to obtain water for domestic use, is not liable for a consequent diversion of unknown subterranean currents from the spring of an adjoining owner.²

(e.) *Removal of Adjoining Building.*

§ 231. **With Ordinary Care, Owner not liable for Injury to Abutters.** — In general a man may use his land for any purpose to which it is adapted, without being accountable therefor, if he uses ordinary care to avoid injury to his neighbor.³ And if, whether landlord or tenant, he finds it necessary to pull down a house, and gives due notice to the owner of the adjoining building of his intention, as well as of the time he proposes to commence work, he is not answerable for any injury such owner may sustain by the operation, provided always that he removes his own with reasonable care.⁴ The

¹ *Acton v. Blundell*, 12 M. & W. 324. The principle of this case is cited with approbation in *Radcliff v. Mayor*, 4 N. Y. 200; and its doctrine was followed in *Ellis v. Duncan*, 29 N. Y. 466. See also *Delhi v. Youmans*, 45 *id.* 362. Where mines were excepted out of a demise of the surface land, it was held that the rights of the respective proprietors of the surface and of the mines did not differ from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of that water by natural percolation set in motion by his neighbor's excavations; for it made no difference whether the respective closes are adjacent vertically or laterally, and the grant of the surface could not carry with it more than the ownership of the entire soil would have done. *Ballacoshish Silv. Co. v. Dumbell*, 29 L. T. N. S. 658. The rule that a mine-owner must protect himself against water flowing from a neighboring mine, in the ordinary course of mining operations, has no application to a case where the consequence of mining operations is the tapping of a river bed, and the turning of the water into his own mine and thence into that of his neighbor. *Crompton v. Lea*, 31 L. T. N. S. 469. And see *Waffle v. N. Y. Cent. R. R. Co.*, 53 N. Y. 11; see § 17 *a*, *ante*.

² *Chase v. Silverstone*, 62 Me. 175.

³ *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Panton v. Holland*, *supra*.

⁴ *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92; *Peyton v. Mayor*, 9 B. & C. 725; *Massey v. Goyder*, 4 C. & P. 161. A statutory provision that when a person excavating on his lot is licensed by the adjoining owners to enter on their land to protect their build-

adjoining owner receiving notice should shore up his own building, and do everything proper for its preservation; and if he neglects to take such precaution, he is without remedy for any injury it may sustain, unless it clearly appears that the pulling-down by the other party was done in so negligent or improvident a manner, as to occasion greater risk than, in the ordinary course of doing the work, ought to have been incurred.¹

§ 232. **Question of Fact whether Due Care is exercised.** — Whether due caution has been used in the removal is, in every case, a question of fact depending upon its own peculiar circumstances. Where action was brought for digging the foundation of an intended building, on a piece of land next adjoining the house of the plaintiff, so carelessly that the walls and foundations of the plaintiff's house gave way, it appeared that the defendants excavated their own ground about six feet deep and came within about four feet from the plaintiff's house. After the excavation, the plaintiff's wall bulged, and the defendants made an ineffectual attempt to shore it up; but it gave way in all directions and it became necessary to rebuild. It was held that the question was whether the fall of the wall was occasioned by the defendants' negligence, or by its own infirmity; that the state of the premises must be taken into consideration; and that if the wall was so infirm as to be unable to sustain itself six months longer, still the defendants had no right to accelerate its fall; and that such a state of the wall would call for more care on the part of the defendants.² So, in an action for negligently and carelessly excavating the defendant's own land, and thereby withdrawing the support from the plaintiff's house, it appeared that, for twenty-six years,

ings from injury by the excavation, he must so protect them; does not impose duty upon a landlord, as towards his tenant, to secure protection for the tenement by giving such license. *Sherwood v. Seaman*, 2 Bosw. 127.

¹ *Walters v. Pfeil*, Mood. & M. 364; per *Ld. Tenterden*, in *Massey v. Goyder*, *supra*; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & E. 493.

² *Dodd v. Holme*, *supra*; *Pierce v. Musson*, 17 La. 389.

the plaintiff had rested his house upon a wall belonging to the defendant, by permission originally from the defendant, and that, by negligently excavating too near his own wall, the defendant had caused it to sink, and thereby injured the plaintiff's house; and the action was sustained.¹

(f.) *Right to Support from Neighboring Soil and Buildings.*

§ 233. **Attaches to Land but not to Buildings thereon, unless ancient.** — A proprietor of land is not at liberty to dig at pleasure on his own soil, without considering what effect such excavation will produce upon the land of his neighbor; since the withdrawal of the lateral support may cause the falling-in of the adjoining land; and the violation of this right of support, which is an easement necessarily attached to the soil, may be compensated for by damages, or restrained by injunction. A man may excavate a canal, or dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. He may excavate and move his own soil, for a lawful purpose, but must not thereby remove the natural support of his neighbor's land, so that it cannot stand by its own coherence. But if anything has been done by the party enjoying the easement to increase the lateral pressure, as where a new building has been erected, he has no right to the increased support necessary to sustain such building.² But if his house has stood

¹ *Brown v. Windsor*, 1 Cr. & J. 20; and see *Haines v. Roberts*, 7 Ellis & B. 625; *Trower v. Chadwick*, 3 Bing. 334. Where the defendant permitted another to remove earth from a hill on defendant's land, and it was so negligently done that earth slid from the hill upon plaintiff's land, the defendant was held liable, upon the general principle that he was bound to so use his own premises as not to injure others. *Mayor v. Bailey*, 2 Den. 445. It is to be intended that the owner has control over those who work upon his premises; and he cannot discharge himself from that intendment of law by any act or contract of his own. *Gardner v. Heartt*, 1 *id.* 466.

² *Farrand v. Marshall*, 21 Barb. 409; s. c. 19 *id.* 380; *Rowbotham v. Wilson*, 8 Ellis & B. 123. Roll. Abr. Trespass, I. pl. 1; *Wyatt v. Harrison*, 3 B. & Ad. 875. In estimating the damages sustained by a tenant for years, whose possession has been injured by a wrongful excavation on

twenty years without adverse claims, it has acquired the rights of an ancient house, by prescription; and though without negligence on the part of the excavator, it cannot then be lawfully disturbed by excavations on adjoining lots. There being no grant or prescription, one may make reasonable improvements and excavations on his own ground, though they should injure or endanger an edifice on the adjoining land, provided he exercises ordinary care and skill.¹ And where a man had built to the extremity of his soil, and enjoyed the building above twenty years, Lord Ellenborough held, upon analogy to the rule as to light and air, that he had acquired a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support; but that it was otherwise of a house newly built.²

§ 234. **Ancient Erections, when not entitled to Support.** — But a house will not have the privilege of support as an ancient erection, if it was built upon ground previously excavated. Where the plaintiff was possessed of two houses, one ancient, and the other built within twenty years upon his own land, and considerably within his own boundary and the defendants excavated so near the boundary as to cause damage to the plaintiff's buildings, one of which stood upon

the adjoining premises, the jury will take into account the expense necessary to restore the building to such a state as would make the possession as beneficial to the tenant as it was before the trespass was committed; but the allowance must not exceed the value of the plaintiff's term, taking into view the rent reserved. *Walter v. Post*, 6 Duer, 363; and see *Gourdier v. Cormack*, *supra*.

¹ *Lasala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460; *Thurston v. Hancock*, 12 Mass. 220; *Story v. Oden*, *id.* 157.

² *Callendar v. Marsh*, 1 Pick. 434; *Stansell v. Tollard*, 1 Selw. N. P. 444; *Wyatt v. Harrison*, *supra*. Where one of two buildings having a common party-wall becomes so dilapidated as to be unsafe, and the owner, after reasonable notice to the tenant of the adjoining building, proceeds to take down the whole wall for the purpose of rebuilding it, he is not responsible to the tenant of the adjoining building for any damages resulting from its exposure to weather or other causes, if he consumes no unnecessary time in completing the work, and uses proper care and skill in its execution. *Partridge v. Gilbert*, 15 N. Y. 601.

ground which had been previously excavated; it was held that if a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support, or otherwise, upon the land of his neighbor; that he has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has that right by grant; and that if the land, on which the house was built had not been previously excavated, the defendants might rightfully have excavated to the extremity of their land. It was further held that if the plaintiff had not built his house on excavated ground, the mere sinking of the ground would have been without injury; and that he had, by building on ground insufficiently supported, caused the injury to himself without the defendants' fault; and that no grant could be inferred, nor the right to an easement become absolute, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants' land.¹

§ 235. **Dominant Estate to be kept in Repair.** — There is also a condition imposed upon the party entitled to support that he shall do nothing to increase the burden imposed upon his neighbor by neglecting to keep his premises in sufficient repair. When the owner of a lot builds upon it, he builds at his peril; and cannot deprive another of the use of his own land in such manner as he shall deem most advantageous.² If, in making an excavation, the adjoining building falls in consequence of its infirm condition, even if, in the ordinary

¹ *Partridge v. Scott*, 3 M. & W. 220. In those cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises, by which he may be injured. *Hay v. Cohoes Co.*, 2 N. Y. 159.

² *Thurston v. Hancock*, 12 Mass. 221. The right to the support of the land immediately around a house is not in the nature of an easement, but is the ordinary right to the enjoyment of property; and till that is interfered with, the party has no legal ground of complaint, although in fact something may have been done which has occasioned results that will afterwards affect his property. *Backhouse v. Bonomi*, 9 H. L. Cas. 503.

progress of decay, it would have fallen in a short time, the neighbor has no right to accelerate its fall, by carelessly removing its support; and a plaintiff may recover for the loss actually sustained, when the injury to the house was the consequence of the defendant's negligence.¹ In such a case, it was held that the plaintiff was entitled to recover damages sufficient to reinstate the wall and the house in as good condition as they were prior to the injury, and also for the loss consequent upon the interruption of his business.²

§ 236. **Servient Estate, User of Subject of the Easement.** — Where one is entitled to support from his neighbor's building, the premises can be used only in subjection to such easement. And it will be an invasion of that right if he does any injury to his neighbor's building in the pulling down of his own, although ever so carefully. The same principle applies to land; for where there was a grant of the minerals under the land and the defendant removed them in such a manner as to cause the surface to fall in, this was held to be a violation of the right of support, to which the plaintiff was entitled.³ For when the surface of land and the minerals under it belong to different proprietors, the owner of the surface is *prima facie* entitled to support from the subjacent strata, and the owner of the minerals, in working them, is bound to leave sufficient support for the surface in its natural state.⁴ A liberty to hang out linen to dry, on lines passing over the soil of another, is an easement which is recognized in the books.⁵

¹ *Dodd v. Holme*, 1 Ad. & E. 506. In determining the question of negligence, the state of the plaintiff's house is to be considered. *Ibid.*

² *Brown v. Werner*, 40 Md. 15.

³ *Trower v. Chadwick*, 3 Bing. N. C. 334.

⁴ *Smart v. Morton*, 5 Ellis & B. 30; *Humphries v. Brogden*, 15 Q. B. 739; *Wilms v. Jess*, 94 Ill. 464; *Yandes v. Wright*, 66 Ind. 319. Under a lease of mineral coal, with right to mine and remove the same, the lessee is not entitled to remove the whole of the coal without leaving sufficient support to maintain the surface in its natural state, unless the lease clearly implies that he is to have such right. *Davis v. Treharne*, 6 H. L. App. Cas. 460; *Burgner v. Humphrey*, 41 Ohio St. 340.

⁵ *Drewell v. Towler*, 3 B. & Ad. 735.

(g.) *How an Easement may be created or extinguished.*

§ 237. **Arises from Agreement.—Adverse Possession.**—The origin of every easement in the land of another is to be referred to some agreement, express or implied. It can only be created by a grant or by prescription which supposes a grant; and uninterrupted possession for twenty years is sufficient evidence from which to presume a grant.¹ But in order that the possession may be conclusive of the right, it must have been adverse, that is, under a claim of title injurious to the right of the owner of the land, yet with his knowledge and acquiescence; and uninterrupted. The burden of proof is on the party claiming.² A mere license is not sufficient to create an easement; for a license is revocable, nor can an easement grow out of a permissive enjoyment for any length of time.³ And where one, for a consideration, would give another the liberty to cut a drain, mine coal, or the like, on his premises, although this conveys no interest in the land itself, yet it gives a freehold right which cannot be created without a deed.⁴ So the right of permanently occupying one's own land in such a manner as to deprive

¹ *Lasala v. Holbrook*, 4 Paige, 169; *Angell on Watercourses*, 77; *Townsend v. McDonald*, 12 N. Y. 381. Easements created by reservation or grant, may be enlarged by prescription. *Atkins v. Boardman*, 20 Pick. 302. Continuous adverse use of a way across another's land for twenty years may be established without direct evidence of its actual use during each year. *Bodfish v. Bodfish*, 105 Mass. 317.

² *Sargent v. Ballard*, 9 Pick. 251; *Borden v. Vincent*, 24 *id.* 301; *Powell v. Bagg*, 8 Gray, 443. The common-law doctrine of continuity of possession prevails in Massachusetts. The possession must be long, continuous, and peaceable; long, that is, during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful, because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. *Thomas v. Marshfield*, 13 Pick. 238. And see *Sumner v. Tileston*, 7 *id.* 198. Whether a possession was adverse is a question for the jury, under instructions. *Putnam v. Banker*, 11 Cush. 542.

³ *Baker v. Boston*, 12 Pick. 184; *Hill v. Hill*, 113 Mass. 103, 107.

⁴ *Cook v. Stearns*, 11 Mass. 533; *Thompson v. Gregory*, 4 Johns. 81; *Harlan v. Lehigh Coal Co.*, 85 Pa. St. 287; *Hays v. Richardson*, 1 Gill & J. 366.

the adjoining owner of an easement, cannot be acquired by a parol license, such license being revocable, even after it has been executed.¹

§ 237 *a*. **License defined. — How to be exercised. — Revocation of.** — A license is an authority to do some act or a series of acts on the land of another without passing an estate in the land. It is not therefore within the rule which requires bargains respecting real estate to be in writing, and, generally, it amounts to nothing more than an excuse for an act which would otherwise be a trespass.² A license may be to remove a building, to cut wood, to draw water, or to take gravel for road-making.³ Being a personal privilege, it can be enjoyed only by the licensee. It is not assignable so that an under-tenant cannot claim the benefit of a license to the lessee.⁴ It must be exercised within a reasonable time in case of a license to cut and carry away wood; since it applies to wood in substantially the state of growth in which it was when the license was given.⁵ It is revocable so long as it remains executory, unless a definite term has been fixed for its continuance, or the licensee has expended money on the faith of it, and is in the enjoyment of its privileges.⁶ A

¹ *Miller v. Aub. & S. R. R.*, 6 Hill, 61; *Owen v. Field*, 12 Allen, 457; *Dexter v. Hazen*, 10 Johns. 246.

² *Jackson v. Babcock*, 4 Johns. 418; *Prince v. Case*, 10 Conn. 875; *Mumford v. Whitney*, 15 Wend. 380; *Jamison v. Milleman*, 8 Duer, 255. A license passes no interest, nor alters or transfers property, but only makes an action lawful which without it would have been unlawful. *Thomas v. Sorrell*, Vaughan, 351; *Owens v. Lewis*, 46 Ind. 489.

³ A privilege to the tenant of one room to put signs on the outer wall is a license only. *Pevey v. Skinner*, 116 Mass. 129. But see *Riddle v. Littlefield*, 53 N. H. 503, *aliter*; *Rathbone v. McConnell*, 21 N. Y. 466; *Pierrpont v. Bernard*, 6 *id.* 279; *Dubois v. Kelly*, 10 Barb. 496; *Syren v. Blakeman*, 22 *id.* 836. The permit includes everything necessarily incident to its exercise. *Clark v. Vt. R. R.*, 28 Vt. 103.

⁴ *Dark v. Johnson*, 55 Pa. St. 144.

⁵ *Gilmore v. Wilbur*, 12 Pick. 120.

⁶ *Collins v. Marcy*, 25 Conn. 289; *Resick v. Kern*, 4 S. & R. 267; *Houston v. Laffee*, 46 N. H. 505; *Fuhr v. Dean*, 26 Mo. 116; *Hetfield v. Cent. R. R.*, 5 Dutch. 57; *Wilson v. Chalfont*, 15 Ohio, 248; *Lacy v. Arnett*, 38 Pa. St. 159. Where the term is fixed and the licensee has made improvements not severable from the freehold, he is held to have

conveyance of the land by the owner works a revocation by operation of law.¹ But when executed, as when the licensee has entered upon the land and done that which he was licensed to do, it becomes irrevocable,² even against a grantee of the owner.³ It is always a justification for acts done under it, while unrevoked; and it is evidence, to defeat a claim for damages sustained by its exercise before notice of its revocation was given.⁴

§ 238. **Assignment of Easements. — Follow the Estate. —** Easements, like other incorporeal rights, can be assigned only by an instrument under seal; but a paper writing, or even a parol declaration, may be made use of to show the character of an act done, or a cessation of enjoyment.⁵ Being rights attached to the estate, and not to the person of the owner of the dominant tenement, easements follow the estate into the hands of an assignee or lessee. An easement established by prescription or inferred from user is limited to the actual user.⁶ Easements are a charge upon the servient tenement, and follow it into the hands of one to whom

such interest as tenant at will as to entitle him to notice to quit, and to compensation for his improvements. *Fuhr v. Deau, supra*; *Allen v. Mansfield*, 82 Mo. 688.

¹ *Carter v. Harlan*, 6 Md. 20; *Cook v. Stearns, supra*; *Wallis v. Harrison*, 4 M. & W. 543.

² *Wilson v. Chalfont*; *Lacy v. Arnett*; *Cook v. Stearns, supra*; *Boone v. Stover*, 66 Mo. 430.

³ *Dubois v. Kelly, supra*; *Carter v. Harlan*, 6 Md. 20; *Eggleston v. N. Y. & Cent. R. R.*, 35 Barb. 162. Trespass will lie against the owner of the land if he destroys the licensed structure. *Dubois v. Kelly, supra*.

⁴ *Miller v. Aub. & S. R. R., supra*; *Marston v. Gale*, 24 N. H. 176; *Potter v. Mercer*, 53 Cal. 667.

⁵ Co. Lit. 264, b; Com. Dig. Release (A. I.) (B. I.). An easement in real estate, whether by grant or prescription, may be extinguished or modified by a parol license, granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. *Cartwright v. Maplesden*, 53 N. Y. 622. And a parol license, which if given by deed would create an easement, is revocable, although executed by the licensee. *Morse v. Copeland*, 2 Gray, 302.

⁶ *Brooks v. Curtis*, 4 Lans. 283. A right to fish, fowl, and hunt, and to go over the meadows, does not confer the right to take sea-weed off the land. *Parsons v. Miller*, 15 Wend. 561.

such tenement is subsequently conveyed. As the right is annexed to the estate for the benefit of which the easement or servitude is created, it will not be destroyed by a division of the estate to which it is appurtenant. The assignee of any part of the estate may claim the right so far as it is applicable to such part; provided the right can be enjoyed as to separate parcels, without any additional charge on the proprietor of the servient tenement.¹

§ 239. **How extinguished.** — A change in the mode of enjoyment will not destroy an easement unless a greater burden is thereby thrown upon the servient tenement; nor will the pulling-down of a house for purposes of repair, cause the loss of an easement attached to it, provided there is an intention to rebuild within a reasonable time.² But it may be extinguished by a renunciation of the party, express or implied, or by permitting the party from whom the servitude is due to build on the property such works as justify the presumption of an abandonment.³ All easements, whether of convenience or necessity are extinguished by unity of possession; but, upon a subsequent severance, easements which, previous to such unity, were easements of necessity, are granted anew, in the same manner as any other easement which would be held by law to pass as incident to the grant.⁴ They may be lost by non-user, unless an intention of resuming the right within a reasonable time is manifested at the time when it ceased to be used.⁵ It appeared that the plaintiff, having

¹ *Hills v. Miller*, 3 Paige, 254.

² *Hall v. Swift*, 4 Bing. N. C. 381. *Luttrell's Case*, 4 Co. 86; *Pope v. Devereux*, 5 Gray, 409. Where a house which by long user had become entitled to have the rain-water shed from its eaves upon the adjoining land was upon rebuilding carried a little higher than before, it was held that, in the absence of any evidence that a greater burden was thrown on the servient tenement by the alteration, the easement was not thereby destroyed, but that the premises were still entitled to the same right of eavesdrop. *Harvey v. Walters*, L. R. 8 C. P. 162.

³ *Taylor v. Hampton*, 4 McCord, 96.

⁴ *Grant v. Chase*, 17 Mass. 443.

⁵ *Corning v. Gould*, 16 Wend. 531. The doctrine of extinction by disuse does not apply to servitudes on easements which have been created by deed. *Smiles v. Hastings*, 24 Barb. 44. In such case there must not

ancient windows, pulled down the wall in which they were situated, and rebuilt on it a wall without any window. Fourteen years after, the defendant erected a building in front of this blank wall, and, after the building had remained there three years, the plaintiff re-opened a window in the place that one of the ancient windows had occupied, and brought action for its obstruction by the defendant's building, but was not permitted to recover, it being held that the right to such an easement is acquired by enjoyment, continuing so long as the party either continues that enjoyment or shows an intention to continue it; and that the ceasing to enjoy it destroys the right, unless, at the time when the party discontinues the enjoyment, he does some act to show that he means to resume it within a reasonable time.¹ In New

only be a disuse by the owner of the land dominant, but an actual adverse user by the owner of the land servient. *Angell on Waterc.*, 269; *Arnold v. Stevens*, 21 Pick. 106; *White v. Crawford*, 10 Mass. 189. Although the use must have been uninterrupted in order to confer title, it need not have been necessarily unintermittent; it is enough that the user is of such a nature and at such intervals as gives the owner an intimation that the right is claimed against him. *Pollard v. Barnes*, 2 Cush. 197.

¹ *Moore v. Rawson*, 3 B. & C. 332; *Manning v. Smith*, 6 Conn. 289; *Pritchard v. Atkinson*, 4 N. H. 1. The case of *Moore v. Rawson* has been used rather for the sake of illustrating a principle applicable to the extinguishment of easements in general than to lights in particular. In fact, the old English doctrine on the subject of light and air, *Aldred's Case*, 9 Co. 58, is said to be an anomaly in the law, and has not been generally adopted in the United States. *Myers v. Gemmel*, 10 Barb. 537; *Keiper v. Klein*, 51 Ind. 316; *Parker v. Foote*, 19 Wend. 309; *Banks v. Am. Tr. Soc.*, 4 Sandf. Ch. 465; *Mullen v. Stricker*, 19 Ohio, 135. It seems never to have been sanctioned in Westminster Hall until 1786, in the case of *Darwin v. Upton*, 2 Wms. Saund. 175, n., which was said to be a departure from the old law. *Bury v. Pope*, Cro. El. 118; *Hoy v. Sterret*, 2 Watts, 331. The case of *City Brew. Co. v. Tennant*, L. R. 9 Ch. 212, defines the modern English doctrine thus: "The right of an owner of ancient lights is to prevent his neighbor from obstructing the access of sufficient light and air, to such an extent as to render his house substantially less comfortable and enjoyable." This it will be observed, as applied to a tenancy, would rest the tenant's right to the enjoyment of light and air upon the landlord's implied covenant for quiet enjoyment, which is in accord with the later view of the law in the United States. See § 309 *a, post*. In Illinois, the English doctrine seems formerly to have been approved. *Gerber v. Geabel*, 16 Ill. 217, but see *Keating v. Springer*,

York, it was held that one omission by the owner, during twenty years, to make use of water-rights, does not impair his title, or confer any right thereto upon another; and that it is not the non-user by the owner, but the adverse enjoyment by another during twenty years, which destroys his right.¹

§ 240. **Extinguishment of, by Abandonment or Non-user.** — Tindal, C. J., said; suppose a person who formerly had a mill upon a stream should pull it down and remove the works, with no intention to return, could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished, or that he should be compelled to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a question of fact subject of inquiry for a jury, whether he had abandoned the use of the stream, or left it for a temporary purpose only.² And where an ancient window had been filled up with brick and mortar for twenty years, it was held that the case stood as if the window had never existed.³ It may be observed that the doctrine of extinguishment by disuse does not apply to easements created by deed. To

146 Ill. 481. In New Jersey, the Chancellor prevented by injunction the obstruction of light enjoyed for twenty-one years. *Robeson v. Pittenger*, 1 Green, Ch. 57. In South Carolina, it was held to be a reasonable right, contributing to the comfort and value of a person's habitation, *McCready v. Thomson*, 1 Dudl. 131, but the law is now otherwise in that State. *Napier v. Dulwinkle*, 5 Rich. 311. So in Ohio. *Mullen v. Stricker*, 19 Ohio St. 135. And in Massachusetts, although the question was for some time left open, — see *Story v. Odin*, 12 Mass. 157; *Atkins v. Boardman*, 2 Met. 475; *Same v. Chilsom*, 7 *id.* 898; *Fifty Assoc. v. Tudor, Gray*, 261, — it is now settled that no such easement can be acquired by prescription by common law. *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 *id.* 583; *Richardson v. Pond*, 15 *id.* 387; *Keats v. Hugo*, 115 Mass. 209. But see § 309 *a*, *post*.

¹ *Townsend v. McDonald*, 12 N. Y. 381.

² *Liggins v. Inge*, 7 Bing. 693; *Martin v. Goble*, 1 Camp. 320; *Garritt v. Sharp*, 3 Ad. & E. 325.

³ *Lawrence v. Obee*, 3 Camp. 514; *Curtis v. Jackson*, 13 Mass. 507; *Blanchard v. Bridges*, 4 Ad. & E. 176.

become extinguished by disuse, an easement must have been acquired by use; but if the easement is founded on a grant, there must not only be a disuse by the owner of the dominant land, but also an actual adverse user by the owner of the servient land.¹

§ 241. **Extinguishment of, by Operation of Law.** — The encroachment by one party upon a way held in common with another by building part of the wall of a house upon a portion of it and enclosing another portion within a fence, works an extinguishment of the way by operation of law, especially where the other party sells his interest after such acts done, and the purchaser on his part acquiesces in and confirms what has been done. The acts relied on to show an extinguishment must be such as clearly indicate an intention to abandon the right to the easement; and, where the suspension does not appear to be merely temporary, a *bonâ fide* purchaser will be protected in the enjoyment of the property as it appeared at the time of the purchase. Where the case is doubtful, the question is one of fact; but where the fact of adverse possession is undisputed, the law establishes the presumption.²

§ 242. **By Act of Owner of Dominant Estate.** — If the act which prevents the servitude is that of the party having the dominant tenement, it will effect an extinguishment of the right. But if it is prevented by the act of God or by the operation of law this will only cause a suspension of it; for the act of a party will be construed most strongly against himself, but he is not to be injured by an act of God or the

¹ *Jewett v. Jewett*, 16 Barb. 150; *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106; *Smyles v. Hastings*, 22 N. Y. 217.

² *Corning v. Gould*, 16 Wend. 531. Abandonment is a simple non-user of an easement; and, in order to establish it, it is well settled that the enjoyment must have totally ceased for the same length of time that was necessary to create the original presumption. The non-user for twenty years affords a presumption, either that the former presumptive right was extinguished in favor of some other adverse right or that it has been surrendered. A mere non-user is sufficient to produce this effect, without showing the erection, or permission to erect, a permanent obstruction. *Ibid.*

law. So the right may be extinguished by an obstruction of a permanent nature interposed by the party to whom the service is due, or by his consent, or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise of it.¹ A right of way is not lost by non-user for less than twenty years;² nor can a mill privilege be considered as extinguished or abandoned by disuse until such disuse has continued for twenty years.³ But twenty-one years' occupation of land, adversely to a right of way, will bar the right.⁴

§ 243. *How acquired by Prescription.* — The exclusive enjoyment of an easement for twenty years without interruption, as we have seen, raises a presumption of title in favor of the occupant, entitling him to claim by prescription. But as prescription is founded on the supposition of a grant, the use or possession on which it is based must be clearly adverse to the claim of some other person, or of a nature indicating that it is claimed as a right and not as being by indulgence, or by any compact short of a grant.⁵ By the English law, a prescription must always be laid in him that is tenant of the fee. And a tenant for life, for years, or at will, cannot prescribe; for as prescription, by that law, is usage beyond the time of memory, it is absurd that he should pretend to prescribe whose estate commenced within the remembrance of man; such tenants, therefore, must prescribe under cover of the tenant in fee-simple.⁶ In New York, Massachusetts, and other States, an easement is acquired by twenty years'

¹ *Taylor v. Hampton*, 4 McCord, 96; *Hall v. Swift*, 6 Scott, 167.

² *Emerson v. Wiley*, 10 Pick. 310; *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27.

³ *Hurd v. Curtis*, 7 Met. 94.

⁴ *Yeakle v. Nace*, 2 Whart. 123; *Moore v. Browne*, Dyer, 319, b, pl. 17.

⁵ *Gayetty v. Bethune*, 14 Mass. 53; *Lawton v. Rivers*, 2 McCord, 445; *Thacher v. Cobb*, 5 Pick. 425; 2 Bl. Com. 265; *Parker v. Foote*, 19 Wend. 309. But it is said that as to a public navigable river, twenty years' possession of the water at a given level is not conclusive of a right. *Vooght v. Winch*, 2 B. & A. 662.

⁶ 2 Bl. Com. 265.

uninterrupted possession; in Connecticut and Vermont, by fifteen years' possession;¹ and in South Carolina it is said to be thirty years.² But it has been held not to exist at all in New Jersey³ and Pennsylvania.⁴ And, in Virginia, twenty-seven years' possession was held to be insufficient ground for presuming a grant.⁵

¹ *Manning v. Smith*, 6 Conn. 289; *Mitchell v. Walker*, 2 Aik. 266.

² *Lawton v. Rivers*, 2 McCord, 445.

³ *Ackerman v. Shelp*, 8 Halst. 125.

⁴ *Young v. Collins*, 2 Browne, 298.

⁵ *Bolling v. Mayor*, 8 Rand. 568.

CHAPTER VII.

OF COVENANTS AND CONDITIONS.

§ 244. **Create Respective Rights and Liabilities.** — Most of the rights and liabilities of both landlord and tenant arise out of the *covenants* which commonly define the obligations of the parties to each other. Some of these covenants are incident to the relation subsisting between them, and are [implied, and] obligatory independently of positive stipulation; while others are the subject of express contract and are obligatory only when inserted in the lease. [A breach of the covenants contained in a lease does not, in the absence of a stipulation to that effect, work a forfeiture of the term.¹] The rights of the parties may be also qualified or limited by *conditions* annexed to the estate at the time of its inception, which may either operate as covenants or terminate the estate, according to circumstances.

SECTION I.

OF COVENANTS.

§ 245. **Defined.** — **Created by Deed.** — **Tenant's Estoppel.** — A covenant is defined as an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing. It can be created only by deed, but it may be by a *deed-poll*, the party being named in the deed,² as well as by *indenture*.³ Generally, where lands are conveyed by

¹ *Vanatta v. Brewer*, 32 N. J. Eq. 26.

² *Green v. Horne*, 1 Salk. 197; *Randel v. Chesapeake & D. Canal Co.*, 1 Harringt. 151, 233.

³ 1 Roll. Abr. 517; *Day v. Brown*, 2 Ham. 345; Co. Lit. 230, b. An instrument executed by two, to which but one seal is affixed, is the covenant of both. *Van Alstyne v. Van Slyck*, 10 Barb. 383.

indenture to a person who does not seal the deed, but enters upon the land, and accepts the deed in other matters, he will be estopped from denying the covenants therein contained which are to be performed by him, and a court of equity will restrain him from violating them.¹ But with respect to the express covenants of a lease, these are only to be performed by the lessee when he has signed the instrument of demise. And where a lease which was intended to embrace special covenants on the part of the lessee was not signed by him, but was received by the lessor and put upon record, the act was deemed to be a waiver of the lessor's right to have such covenants executed.²

§ 246. **Express or Implied.** — **Inferred from Construction of the Instrument.** — Covenants in a lease are either express or implied; or, as they are otherwise termed, covenants in deed, and covenants in law. Express covenants are those which are created by the [written] words of the parties, declaratory of their intention. Implied covenants are those which are necessarily to be inferred from the relation of parties to each other. No precise or technical language is necessary for the purpose of creating a covenant.³ It may be put in the form of a condition, an exception,⁴ or even a recital;⁵ for whenever an intention of the parties can be collected out of the instrument, amounting to an agreement to do, or not to do, a par-

¹ *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Trotter v. Hughes*, 12 *id.* 74; *Halsey v. Reed*, 9 Paige, 446; *Rawson v. Copland*, 2 Sandf. Ch. 251.

² *Libby v. Staples*, 39 Me. 166; *McCrea v. Purmort*, 16 Wend. 460.

³ *Davis v. Lyman*, 6 Conn. 249; *Bull v. Follett*, 5 Cow. 170; *Lant v. Norris*, 1 Burr. 290, per *Ld. Mansfield*. Where words importing a covenant are intended to operate as a condition, they are always express to that point. *Surplice v. Farnsworth*, 7 M. & G. 576, 584.

⁴ *Holder v. Taylor*, 1 Roll. Abr. 518, l. 19; *Russell v. Gulwel*, Cro. El. 657; *Lowell M. H. v. Hilton*, 11 Gray, 407.

⁵ *Penn v. Preston*, 2 Rawle, 14; *Barfoot v. Freswell*, 3 Keb. 465. Thus in a lease of a lot, the words "with the fire-proof brick cotton-warehouse thereon" amount to a covenant that it is fire-proof, especially as it appears to have been the intention of the parties to secure such a warehouse. *Vaughan v. Matlock*, 28 Ark. 9. But a lease of a salt-well or of several salt-wells enumerated, implies no covenant of capacity. *Clark v. Babcock*, 28 Mich. 164; *Clifton v. Montague*, 40 W. Va. 207.

ticular thing, it is sufficient to create a contract.¹ Thus, if it is agreed between two persons, under seal, that one shall pay the other a sum of money for his lands on a particular day, this will amount to a covenant, on the part of the latter, to convey the lands on that day.² So, where an office had been conveyed by the plaintiff to the defendant, *provided*, that out of the first profits he should pay the plaintiff £500, it was held, that this proviso was in the nature of a covenant, and that an action of covenant would lie upon it.³ And with re-

¹ *Hallett v. Wylie*, 3 Johns. 44; *Hill v. Carr*, 1 Ca. in Ch. 294; *Randall v. Lynch*, 12 East, 182; *Chancellor v. Poole*, Doug. 766; *Johnson v. Boyfield*, 1 Ves. 314; *Livingston v. Stickles*, 8 Paige, 398. The leading rule of construction is, that contracts are to be expounded so as to carry into effect the intent of the parties appearing from the whole instrument; not from particular expressions, but *ex antecedentibus et consequentibus*, according to the reasonable sense. *Davis v. Lyman*, 6 Conn. 249; *Watchman v. Crook*, 5 Gill & J. 239; *Quackenboss v. Lansing*, 6 Johns. 49; *Marvin v. Stone*, 2 Cow. 781; *Westcott v. Thompson*, 18 N. Y. 367; *Iggulden v. May*, 7 East, 241; *Browning v. Wright*, 2 B. & P. 13; *Doe v. Abel*, 2 M. & S. 541; *Nind v. Marshall*, 1 Br. & B. 319; *Boyle v. Peabody Heights Co.*, 46 Md. 623. The intent of both parties must be considered. *Briggs v. Vanderbilt*, 19 Barb. 222. When written, the language used is to govern, if it be clear and explicit and does not involve an absurdity. *Buck v. Buck*, 18 N. Y. 339; *Moffat v. Henderson*, 50 N. Y. S. C. 211. Particular clauses are subordinate to the general intent. *Decker v. Furniss*, 14 *id.* 615. A covenant cannot be controlled by a verbal agreement; but parol evidence of fraud or mistake in it is admissible: *Hustons v. Winans*, 3 Wend. 163; *Thomson v. White*, 1 Dall. 424; *Christ v. Dffenbach*, 1 S. & R. 464; *McRae v. Purmort*, 16 Wend. 460; *Depeyster v. Hasbrook*, 11 N. Y. 582; and independent collateral, although contemporaneous, agreements relating to the same subject-matter, may be supported; *Church v. Brown*, 21 N. Y. 319, 330. Ambiguous expressions are construed most strongly against the party using them. But if opposite intentions are expressed, the first in order shall be preferred; or, if one of two things is to be done, the option is in the person who is to perform it, *Shep. Touch.* 166; *Rubery v. Jervoise*, 1 T. R. 229; *Dann v. Spurrier*, 3 B. & P. 399; *Hoover v. Clark*, 3 Murph. 169; *Randel v. Ches. & D. Canal Co.*, 1 Harringt. 233; *Cartwright v. Amatt*, 2 B. & P. 43; *Layton v. Pearce*, Doug. 15. Uncertain terms are to be interpreted in the sense in which the promisor believed, at the time, that the promisee understood them. *Barlow v. Scott*, 24 N. Y. 40; *Mowatt v. Londesborough*, 3 Ellis & B. 307. See § 160 *a, ante*.

² *Pordage v. Cole*, 1 Saund. 319.

³ *Clapham v. Moyle*, 1 Lev. 155.

spect to words which are not in form either a covenant or condition, they will be construed to be either the one or the other, where, without such construction, the party would have no remedy; while the leaning of the law against forfeitures always inclines the courts to construe them as covenants rather than as conditions.¹ [Thus a clause in a lease to the effect that the lessor may take any part of the land for building, on making a proportionate abatement in the rent and making good the fences; operates as a covenant and not as a defeasance of the estate, if there are no words giving a right of re-entry.² So a clause giving a lessor the right to sell the premises on certain notice given to the lessee; he to have the option to buy; is enabling and not restrictive of the lessor's general right to sell.³]

§ 247. *Inferred from Circumstances.* — *Whole Instrument to be construed together.* — In general, when circumstances exist from which an agreement between the parties may be inferred, they are equivalent to an express promise.⁴ As where a lease was made, on condition that the lessee should keep and leave the houses at the end of the term in as good plight as he found them; the lessee was held liable for omitting to leave the houses in good repair, for an agreement to that effect was to be understood.⁵ So in the case of a lease for years "rendering rent," the word "render" was adjudged to amount to a covenant to pay rent.⁶ [So where in a lease of a coal-mine, the lessee agreed not to injure the surface in removing coal, and this was referred to as a condition; it was held to be a covenant.⁷] But wherever the words do not

¹ *Aiken v. Albany V. & C. R. R.*, 26 Barb. 289. But see *Palmer v. Fort Pl. & C. Co.*, 11 N. Y. 376. A contract will be construed a grant or a covenant, according to the intention of the parties, when it will act as either. *Culver v. Shriner*, 5 H. & I. 218.

² *Doe v. Phillips*, 2 Bing. 13; 9 Moore, 46.

³ *Callahan v. Hawkes*, 121 Mass. 298.

⁴ *Lamb v. Bunce*, 4 M. & S. 275.

⁵ *Bac. Abr. Cov. A.*; *Roll. Abr.* 518. A lease need not contain an express covenant to build in order to make it an improvement lease. *Barclay v. Wainwright*, 86 Pa. St. 191.

⁶ *Giles v. Hooper*, *Castle*, 135; *Delancey v. Ganong*, 9 N. Y. 9

⁷ *McKnight v. Krentz*, 51 Pa. St. 232.

amount to an agreement, or are merely conditional for the purpose of defeating the estate, or relate to some collateral act or matter which is not parcel of the demise ; as, if a lease be granted, *provided and on condition* that the lessee shall collect and pay the rents of the other houses of the lessor, there is no covenant ; for these words are evidently intended to limit the estate.¹ And it is immaterial in what part of the deed a covenant is inserted ; for, in its construction, the whole deed must be taken into consideration, in order to discover the meaning of the parties ; and the meaning is to be collected from the whole context of the instrument, as well from that which precedes as from what follows the covenant, according to the reasonable sense of the words.²

§ 248. *Exception may amount to.* — Words expressing an exception may amount to a covenant ; as where a lessee agreed that he would, “ during the term, plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheepwalk), in a regular and due course of husbandry, according to the custom of the country,” the exception was held to import a direct obligation not to plough the rabbit-warren and sheepwalk ;³ and so as to the provision that A. should take firebote, without cutting more than was necessary.⁴ But on a covenant by a lessee, “ to repair the demised premises (principal timber only excepted),” the lessor was held not to be obliged to deliver the timber ; for the exception amounted to no more than that he was to provide it ready for the defendant to carry away.⁵

¹ *Geery v. Reason*, Cro. Car. 128; *Simpson v. Titterell*, Cro. El. 242; *Ld. Cromwell's Case*, 2 Co. 71, b; *Palmer v. Fort Pl. & C. Co.*, 11 N. Y. 376.

² *Knickerbacker v. Killmore*, 9 Johns. 106; *Davis v. Lyman*, 6 Conn. 249; *Ludlow v. McCrea*, 1 Wend. 228; *Plowd.* 329, cited by Lord Ellenborough in *Iggulden v. May*, 7 East, 241.

³ *St. Albans v. Ellis*, 16 East, 352.

⁴ *Stevinson's Case*, 1 Leon. 324.

⁵ *Brailsford v. Parsons*, 1 Lutw. 308; *Stone v. Gilliam*, 1 Show. 149. Words are to be taken in their legal sense, unless it is apparent that they were meant in another sense. All contracts must be expounded with reference to their subject-matter, to which end evidence of the state of things existing when they were concluded is competent. The custom of the

§ 249. **May rest on a Recital.** — Words of recital considered with the rest of the instrument may express a covenant; as, if one in a deed recites that he is possessed of a certain interest in land, and assigns it over, covenanting to perform all the agreements in the deed; if he is not possessed of such an interest, there is already a breach of the covenant.¹ So, where one entitled to a term for ninety-nine years, “if three persons named should live so long,” recited his interest, stating that one life was in being, and then assigned his term, it was adjudged that such recital amounted to a covenant that the life continued.² And where a lease contained a recital of an agreement with the lessor that the lessee should pull down an old mill and build another; and also contained a covenant to keep the new mill in repair, but not for building it; it was held that the covenant to build was implied in the recital.³ But a recital in a covenant, executed by one of the parties through misapprehension or mistake, will not in equity be conclusive upon the party; but it may be shown that the recital is not true, and that it was inserted through misapprehension or mistake.⁴

§ 250. **Proviso may be equivalent to.** — A proviso may amount to nothing more than a covenant; as, where a lease was made to a lessee for life, with a proviso that, if the lessee should die within the term of forty years, the executor of the lessee should have it for so many of the years as should amount to the number of forty, to be computed from the date place is an implied term of every contract; but a usage cannot be set up in contravention of an express contract. *Master v. Howard*, 6 T. R. 338; *Pavey v. Burch*, 3 Miss. 447; *Doe v. Burt*, 1 T. R. 701; *Hassell v. Long*, 2 M. & S. 363; *Gillett v. Newman*, 1 Taunt. 187; *Yeats v. Pim*, 2 Marsh. 141. The subsequent acts of contracting parties are inadmissible to explain their original intention. The rules for the construction of contracts are the same, whether the instrument is by parol or under seal. *Clifton v. Walmesley*, 5 T. R. 564; *Seddon v. Senate*, 13 East, 63.

¹ *Severn v. Clerk*, 1 Leon. 122; *Johnson v. Proctor*, Yelv. 175; *Browning v. Wright*, 2 B. & P. 25.

² *Best v. Brett*, 1 Roll. Abr. 518; *Hollis v. Carr*, 3 Swanst. 649; *Barton v. Fitzgerald*, 15 East, 580; *Barfoot v. Freswell*, 3 Keb. 465.

³ *Sampson v. Easterby*, 9 B. & C. 505.

⁴ *Rich v. Hotchkiss*, 16 Conn. 409.

of the lease, the proviso was held only to amount to a covenant.¹ Or if a lessee for years covenants to repair, "provided always, and it is agreed that the lessor shall find great timber," &c., the word "agree" creates a covenant on the part of the lessor to find great timber, and will not be considered as a qualification of the lessee's covenant.² But if the word "agreed," or some equivalent expression, is not made use of, the proviso will not operate as a covenant on the lessor's part, but only as a qualification of the covenant of the lessee; for words in an instrument under seal, which have evidently been inserted by way of condition or defeasance, will not amount to a covenant.³ Nor do words in a deed expressing the quantity of land, of themselves amount to a covenant that there is such a quantity, for they are merely descriptive.⁴

§ 251. **License may operate as.** — A license under seal may take effect as a covenant; as, where it authorizes the party to whom it is made to go upon the land of the licensor and use the land for his own profit; and in that case it would be equivalent to a lease. Or such a license may be limited to some particular purpose, as to cut wood or draw water [or to mine on a certain lot], and in either case would be supported as a covenant, and effect given to it in the same manner as any other contract.⁵ And the same license may operate as a contract as to some things and a mere permit as to others, as in the case of a grant with permission to go upon the land of the grantor, and make a watercourse to flow over the land of the licensee. Such a license being coupled with the grant and forming part of its consideration would amount to the grant of a watercourse, and would be irrevocable; so that an action would lie for any breach or interference therewith.⁶

¹ *Parker v. Gravenor*, Dyer, 150, a; 1 Co. 155, a.

² *Holder v. Taylor*, 1 Brownl. 23; *Pordage v. Cole*, 1 Saund. 319; *Samways v. Eldsley*, 2 Mod. 78.

³ *United States v. Brown*, 1 Paine, C. C. 422; *Huddle v. Worthington*, 1 Ham. 423; and see *Treloar v. Bigge*, L. R. 9 Exch. 151.

⁴ *Powell v. Clark*, 5 Mass. 355; *Beach v. Stearns*, 1 Aik. 325.

⁵ *Davis v. Townsend*, 10 Barb. 333; *Boone v. Storer*, 66 Mo. 430.

⁶ *Wood v. Leadbitter*, 13 M. & W. 838; *Thomas v. Sorrell*, Vaugh. 380; *Cook v. Stearns*, 11 Mass. 533; *Cheever v. Pearson*, 16 Pick. 266, 278.

§ 252. **Implied, arise as Conclusions of Law.**—Implied covenants depend upon the intendment and construction of law; and are such as the law raises from the relation of the parties or from the use of certain terms in establishing that relation; in the absence of any express agreement on the subject, between them.¹ Thus, if land be granted for a term of years, by the words “demise” or “grant,” without express covenant for quiet enjoyment, the lessee or his assigns, if the lessor’s title proves to be defective, or he is ousted by rightful title, may sustain an action on the implied covenant that the lessor warranted a good title at the time of executing the deed; for the word “demise” imports a covenant for quiet enjoyment as well as a power of letting. So the word “grant” implies the power of giving;² although it does not constitute a war-

¹ *Walker v. Brown*, 28 Ill. 383. But covenants thus implied, or covenants in law, must be distinguished from covenants said to be *implied by construction* from the words of the agreement; for these last are, properly speaking, express covenants. See *Williams v. Burrell*, 1 C. B. 402, 429 *et seq.* “The distinction between covenants, and the only distinction, we take to be this: they are either covenants by express words, or covenants in law. Co. Lit. 139, b. . . . A covenant in law . . . is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate. But the legal effect and operation of a covenant, whether framed in express terms, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense, differs nothing in its operation or legal consequences from an express covenant.” Such “an implied covenant is to all intents and purposes an express covenant, and it is only those covenants which the law itself implies that can properly be considered as covenants in law.” The words “yielding and rendering” are accordingly not properly an implied covenant, but an express one, by construction. They are, it is true, often termed an implied covenant, but this can only mean by construction, and that is tantamount to an express covenant; and they should have all the incidents of the latter. See *Hellier v. Gaspard*, 1 Sid. 266; *Newton v. Osborn*, Style, 387; *Bingh. Real Prop.* 388, 389; *Bowen v. Hodges*, 13 C. B. 765, 774. In one case only was the point decided otherwise; viz., *Kimpton v. Walker*, 9 Vt. 191; though many *dicta* are found to that effect. But in that case (p. 200) it is admitted that “*the words express the thing to be done, and, in that sense, are express.*”

² *Grannis v. Clark*, 8 Cow. 36; *Frost v. Raymund*, 2 Caines, 188; *Deering v. Farrington*, Freem. 368; *Hackett v. Glover*, 10 Mod. 142; *Spencer’s Case*, 5 Co. 17; *Barney v. Keith*, 4 Wend. 502; *Wells v. Mason*,

ranty when used in a conveyance of freehold estate.¹ And in an agreement to assign a lease an undertaking is implied to warrant the lessor's title and the lessee's right to assign.² A covenant is also implied on the part of the lessee, that he will use land demised to him in a husbandlike manner, and not unnecessarily exhaust the soil by negligent or improper tillage.³ And, as a consideration is necessary to every contract, it is always implied that the tenant shall pay an annual rent unless the lease was granted in consideration of a sum in gross. So a covenant by a lessee to pen and fold the flock of sheep which he should keep upon the premises, upon those parts of the land where they had usually been folded, was held to imply a covenant to keep a flock of sheep upon the premises.⁴

§ 253. **Implied, cannot control but may enlarge or qualify Express Covenants.** — It is a well-settled rule that where there is an express covenant the law will not imply one. But an implied covenant may be qualified, enlarged, or restrained by an express covenant.⁵ Thus the implied covenant for quiet enjoyment against all persons claiming title, may be enlarged by the lessor's covenanting against disturbances by all persons whatsoever; or narrowed by his covenanting against the acts of such persons only as claim through him. But an implied covenant may exist in the deed if it is consistent with, and

4 Scam. 84; *Folts v. Huntley*, 7 Wend. 210; *Adams v. Gibney*, 6 Bing. 656; *Stott v. Rutherford*, 92 U. S. 107. A recited antecedent agreement may raise a covenant by implication. *Easterby v. Sampson*, 6 Bing. 644. So the word "*let*," or any equivalent words, imports a covenant of quiet enjoyment. *Hall v. City Brew. Co.*, 12 B. & S. 737; *Maule v. Ashmead*, 20 Pa. St. 482; *Ross v. Dysart*, 33 *id.* 452; *Hamilton v. Wright*, 28 Mo. 199; *Montagu v. W. & Mos. C. & I. Co.*, 1 L. R. C. P. Div. 145; *Stott v. Rutherford*, *supra*. But see *Lovering v. Lovering*, 13 N. H. 513.

¹ *Spencer's Case*, 5 Co. 18, a; *Browning v. Honeywood*, Freem. 339-414. But these words import no covenant in an assignment. *Landydale v. Cheney*, Cro. El. 157; *Blair v. Rankin*, 11 Mo. 442.

² *Souter v. Drake*, 5 B. & Ad. 992; *Bensel v. Gray*, 38 N. Y. Sup'r, 447; *Same v. Same*, 44 *id.* 253.

³ *Powley v. Walker*, 5 T. R. 373; *Walker v. Tucker*, 70 Ill. 527.

⁴ *Webb v. Plummer*, 2 B. & A. 746.

⁵ *Kent v. Welch*, 7 Johns. 258; *Sumner v. Williams*, 8 Mass. 201.

not contradictory to the express covenant: ¹ thus, a stipulation in a lease regulating the disposition of the hay, straw and manure, does not exclude an agreement, implied from custom, that the tenant shall be paid for his seeds and labor.² And an express covenant will be limited to its proper force, and not imply an obligation not strictly *in pari materia*. Thus a covenant of warranty does not imply a covenant of seisin; nor, under such a covenant, can it be assigned as a breach that there was no such land as the grantor undertook to dispose of.³ So a covenant of quiet enjoyment in a lease by a vendee was held not to be a warranty against a restriction on the use of the premises contained in the deed to the vendee.⁴

§ 254. **Of Mesne Lessors and their Lessees.**—Where a lessee assigns the leasehold premises, “to have and to hold in as ample a manner, to all intents and purposes, as the assignor might or could hold the same, and covenants that he had good and lawful right to bargain and transfer the premises, as above written, and that the same are free of all arrearages of rent, and other incumbrances,” the covenant is limited to the acts of the assignor himself, and does not amount to a warranty of the landlord’s title.⁵ And if, in an under-lease, the sublease covenants to keep down the rent reserved in the original lease, and the superior landlord distrains, at the end of the first quarter of the under-lease, for one quarter’s rent due under the superior lease, there will be no implied covenant on the part of the sublessor to indemnify his lessee, although the rent in the under-lease is reserved

¹ *Gates v. Caldwell*, 7 Mass. 68; *Christine v. Whitehill*, 16 S. & R. 98; *Morris v. Harris*, 9 Gill, 19.

² *Hutton v. Warren*, 1 M. & W. 466, qualifying expressions in *Webb v. Plummer*, 2 B. & A. 750. In *Holford v. Dunnett*, 7 M. & W. 348, it seems held that the obligation of the lessee to use the premises in a tenant-like manner will be implied, though there is an express covenant to repair; but see *Standen v. Christmas*, 10 Q. B. 135, *contra*.

³ *Cutter v. Powell*, 6 T. R. 320; *Vanderkarr v. Vanderkarr*, 11 Johns. 122.

⁴ *Dennett v. Atherton*, L. R. 7 Q. B. 316.

⁵ *Knickerbacker v. Killmore*, 9 Johns. 106.

yearly.¹ So an express covenant against persons named restricts any implied covenant arising under the word "demise."² And an express covenant for quiet enjoyment restrains the implication usually contained in the word "demise," which usually implies two covenants, to wit, a covenant for title, and another for quiet enjoyment.³

§ 255. **How Limited by Construction.** — In order to support the apparent intention of the parties, covenants expressed in large and general terms may be narrowed and limited;⁴ as, where the defendant sold the plaintiff a lease for years, and covenanted that he would not do nor have done any act to disturb the plaintiff, but that the plaintiff should hold and enjoy without the disturbance of the vendor or any other person; it was held that the application of the covenant was confined to acts done or to be done by the vendor, and that the words "or any other person" were to be referred to and regulated by the former part of the engagement.⁵ So a covenant that the grantors were seised of a good estate in fee and had good right to convey, was held to be qualified and restrained by a subsequent covenant for quiet enjoyment, without let or interruption by them, their heirs, or other persons claiming under them.⁶ [A covenant in the nature of a restriction or limitation upon the use of property leased will not be enlarged by construction, and any doubt arising will be resolved in favor of the lessee.⁷ Thus it is held that a landlord who allows his tenant to expend large sums of money in valuable and lasting improvements, without objection or inquiry as to his intent

¹ *Upton v. Fergusson*, 3 Moore & S. 88.

² *Merrill v. Frame*, 4 Taunt. 329.

³ *Line v. Stephenson*, 4 Bing. N. C. 678; s. c. 5 Bing. N. C. 183. A mere parol demise imports only a contract for quiet enjoyment, not for title. *Granger v. Collins*, 6 M. & W. 456; *Bandy v. Cartwright*, 8 Exch. 913; *Vernam v. Smith*, 15 N. Y. 327, 332; *Maule v. Ashmead*, 20 Pa. St. 482; *Carson v. Godley*, 26 *id.* 117; *Ross v. Dysart*, 33 *id.* 452.

⁴ *Cole v. Hawes*, 2 Johns. Cas. 203; *Miller v. Heller*, 7 S. & R. 40.

⁵ *Broughton v. Conway*, Moore, 58; *Gale v. Reed*, 8 East, 89; *Nind v. Marshall*, 1 Br. & B. 319.

⁶ *Milner v. Horton*, McClell. 647; *Doe v. Meux*, 4 B. & C. 606.

⁷ § 403, *post*, notes and cases cited.

in respect to violation of covenants, is estopped to assert a forfeiture of the lease because of such improvements, where no substantial damage results from the alternation.^{1]}

§ 256. **Express and Implied, Distinctions between.** — The distinction between express and implied covenants is important, and not merely technical. Express covenants will be construed more strictly than those which are implied, and may be entered into without a consideration, while the latter cannot² [but it is held that the seal of a covenant always imports a consideration. Such covenants contained in a lease will not be extended by implication, unless the implication is clear and undoubted³]. Implied covenants cannot extend to a thing not *in esse* at the time of the demise; therefore if A., in consideration that B. will build a mill upon the land, and make a watercourse through it, grants and demises the land to B. for a term of years, and afterwards stops the watercourse, B. cannot maintain covenant against him.⁴ Such covenants are confined to the party covenanting, and do not bind his representatives; and although the word “demise” in a lease, where there is no express covenant for title, amounts to an implied covenant to that effect, yet if the lessor be tenant for life only, and the remainder-man should oust the lessee, the latter

¹ *Hawes v. Favor*, 161 Ill. 440; *Postal Telegraph Co. v. Western Union Tel. Co.*, 155 *id.* 835. In the latter case it was held that a restrictive covenant in a lease of offices to a telegraph company that, during the term, the lessor would not lease offices in the building to any other telegraph company for use as a telegraph office without consent of the lessee; would not prevent another telegraph company, subsequently purchasing the fee subject to existing leases, from using the building for its own offices.

² *Shubrick v. Salmond*, 3 Burr. 1639; *May v. Trye*, 1 Freem. 447.

³ *Smiley v. McLauthlin*, 138 Mass. 863.

⁴ *Huddy v. Fisher*, 1 Leon. 278. The implied covenant of quiet enjoyment only applies to conditions in existence at the time of the leasing. It does not extend to things not *in esse* at the time of the demise. The appurtenances of ingress and egress, essential to use and reasonably within the contemplation of the parties at the time of the leasing, are necessarily a part of the estate conveyed. *Shaft v. Carey*, 107 Wis. 278. The Michigan statute (§ 2204, Stats. 1898) to the effect that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not, does not apply to leasehold estates. *Ibid.*

will have no remedy on the merely implied covenants, as against the executors of the lessor.¹

§ 257. **Implied, Statute as to, construed in New York.** — The common-law doctrine of implied covenants in leases for years was at one time considered as abrogated in New York by a provision of the Revised Statutes, which declared that “no covenant shall be implied in any conveyance of real estate whether such conveyance contain special provisions or not;” the words “real estate” being construed to include leases for years.² But this construction was subsequently overruled,³ and it is now held in that State that there is nothing in the statute which is intended to apply to terms for years, and that a covenant for quiet enjoyment is necessarily implied in every lease for years.⁴

§ 258. **Parties.** — **Who may maintain Actions on Covenants.** — With respect to the parties to a covenant, it is a general rule that where a contract is made for the benefit of a third person it is valid, and may be enforced by him if he has an interest in the subject-matter of the contract;⁵ but where it is made under seal, and *inter partes*, no one but a party to the instrument can maintain an action for a breach of it.⁶ An indenture not *inter partes* will have the operation of a deed-poll, on which an action may be maintained by a party not executing it, but to and with whom the covenant is made.⁷ Thus where

¹ *McClowry v. Croghan*, 1 Grant's Ca. 211; *Adams v. Gibney*, 6 Bing. 656.

² *Baxter v. Ryerss*, 18 Barb. 284; *Kinney v. Watts*, 14 Wend. 38.

³ *Tone v. Brace*, 8 Paige, 597; 11 *id.* 569.

⁴ *Mayor v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 *id.* 327; *Burr v. Stenton*, 42 *id.* 462; and see § 304, *post*.

⁵ *Brewer v. Dyer*, 7 Cush. 337, where lessor maintained *assumpsit* on an agreement given to the lessee for the rent by one who had received occupation from him. So see *Lawrence v. Fox*, 20 N. Y. 268; *Van Schaick v. Third Av. R. R.*, 38 *id.* 346; when the obligation is not under seal. But that a mere beneficiary cannot sue, see *Mellen v. Whipple*, 1 Gray, 317; and *Brewer v. Dyer* has since been doubted. See § 155, *ante*, and note.

⁶ *Spencer v. Field*, 10 Wend. 87; *Stone v. Wood*, 7 Cow. 453.

⁷ *Matthewson's Case*, 5 Co. 22.

A. covenanted with B. to pay him a certain sum of money, and in the same instrument also covenanted with B. and C. to pay C. another sum of money, it was held that as this was not an indenture between parties, but a deed-poll, the party might covenant with a stranger, and also with other persons, to do several other acts for which each severally might bring his action.¹ But a party for whose benefit merely a covenant is made cannot maintain an action thereon; nor by a deed *inter partes* can one who is a party to the deed covenant with another who is no party to it; even for the performance of acts expressly for such third person's benefit.² Yet if one who is a mere stranger, and not named a party (the instrument being *inter partes*), covenants with another who is named, and seals the deed, he is bound by his seal. As, where one agreed to let a house to another at a certain rent, and a stranger covenanted on behalf of the lessee that the lessee should pay the rent, it was held that on this deed the defendant, although not a party, was liable to an action of covenant, in consequence of his having sealed.³

§ 259. **Grantee in Deed-poll not liable in Covenant.** — No action of covenant can be maintained under a deed-poll against a lessee claiming title to the estate, nor can mutual covenants arise under such an instrument, as it is the deed of one party only.⁴ It would, therefore, be unsafe to dispense with the

¹ *Lowther v. Kelly*, 8 Mod. 115; *Lucke v. Lucke*, 1 Lutw. 302; *Cooker v. Child*, 2 Lev. 74; *Van Alstyne v. Van Slyck*, 10 Barb. 383.

² *Haskett v. Flint*, 5 Blackf. 69; *Bleecker v. Bingham*, 3 Paige, 246.

³ *Storer v. Gordon*, 3 M. & S. 822; *Metcalf v. Rycroft*, 6 *id.* 75; *Wheelright v. Beers*, 2 Halst. 391; *Berkeley v. Hardy*, 5 B. & C. 355; *Southampton v. Brown*, 6 *id.* 718.

⁴ *Chancellor v. Poole*, 2 Doug. 764; *Staines v. Morris*, 1 Ves. & B. 14; *Wilkins v. Fry*, 1 Mer. 266; *Sutherland v. Lishnan*, 3 Esp. 42; *Kimpton v. Eve*, 2 Ves. & B. 353; *Burnett v. Lynch*, 5 B. & C. 589; *Trustees v. Spencer*, 7 Ohio, 493, where a lessee under a sealed lease, who had entered but not sealed, was held not liable to lessor in covenant. But in *Aiken v. Alb. R. R.*, 26 Barb. 289, the grantee in a deed-poll who had entered was held bound by acts covenanted to be done by him, although the words were the grantor's; and, in *Finley v. Simpson*, 2 Zab. 311, and *McLaughlin v. McGovern*, 34 Barb. 208, the same doctrine was laid down, with regard to a lessee by indenture who had entered, but neither signed nor sealed

execution of an indenture by the lessee, on the assumption that his entry and enjoyment under the lease would be sufficient to expose him to an action for a breach of any of the covenants to be performed by him [although a promise to pay rent may be inferred from the lessee's entry and possession, at least until a surrender of the term is accepted by the lessor¹]. But a covenantee, without executing the deed, may bring an action of covenant against the covenantor, whether the instrument be by deed-poll or indenture; for the execution by a covenantor fixes his liability.²

§ 260. **Personal, or running with the Land.** — Covenants in a lease are either personal, or run with the land. If they extend to a thing *in esse*, parcel of the demise, and touch or concern the estate, as to rebuild or repair, they run with the land and every part thereof, and bind not only the covenantor and his personal representatives by privity of contract, but also the assignee, though not named, and every other person who is in of any estate created by, or growing out of the original demise, by privity of estate.³ And if they relate to

the lease; and see Co. Lit. 231, a; *Lock v. Wright*, 8 Mod. 40. The opposite doctrine was laid down in *Platt, Cov.* 10-12; *Maule v. Weaver*, 7 Pa. St. 329; *Irish v. Johnston*, 11 *id.* 488.

¹ *Burkhardt v. Yates*, 161 Mass. 591; *Libbey v. Staples*, 89 Me. 166; *Worster v. Great Falls Manuf. Co.*, 41 N. H. 16.

² *Smith et al. v. Kerr*, 3 N. Y. 144; *Petrie v. Bury*, 3 B. & C. 353; *Vernon v. Jefferys*, 2 Stra. 1146; *Codman v. Hall*, 9 Allen, 835. Such an action lies also in favor of the assignee of the lessee. *Aveline v. Whisson*, 4 M. & G. 80. And if a lease by indenture has been accepted and occupancy had thereunder, its covenants bind the lessee, although the statute requirement that it should be witnessed, acknowledged, and recorded in order to be effectual against any but the grantor, has not been complied with. *Ripley v. Cross*, 111 Mass. 41.

³ *Spencer's Case*, 5 Co. 16, first resolution. On a covenant by a lessee, not naming assigns, to repair and yield up in repair, all buildings and erections, an assignee is liable in respect of the non-repair of buildings erected during the term; for this is not a future obligation, but a present one to do something conditionally. *Minshull v. Oakes*, 2 H. & N. 793; *Martyn v. Clue*, 18 Q. B. 661. But the assignee of the reversion is not so bound: *Ibid.*; *Hansen v. Meyer*, 81 Ill. 321; though in the latter case the decision is based on the 2d resolution in *Spencer's Case*. Much learning has been expended in endeavoring to distinguish between covenants,

a thing not *in esse*, but which is yet to be done upon the land tending to enhance its value, or to render its enjoyment more beneficial to the owner or occupant, as to build a house or a wall, the assignees, if named, are also bound.¹ But if they do not touch or concern the thing demised, as to build a house *de novo*; or to build on other land; or to pay a collateral sum to the lessor, — the assignee, though named, is not bound; such covenants being considered mere personal covenants not affecting the land demised, but merely collateral to it.² [Thus where a lessee had covenanted for himself and his heirs to pay rent during the term, and after his death his son entered into possession and paid rent for several months, it was held that the son was not liable on the covenant, since this did not run with the blood, and could not be inherited.³ These rules are stated as applicable to the lessee's covenants only; but they apply equally to the covenants of a lessor which will run with the land demised and enure to the lessee's assigns under like conditions. At common law, the assignees of a reversion were neither bound by nor could take advantage of the covenants or conditions in the lease, although these were of a nature to run with the land. This was altered by Stat. Hen. VIII. c. 34, as to assignees of reversions on leases for life or years.]

§ 261. **Running with the Land, what. — Concern the Land. — Privity of Estate essential to create. —** In order that a covenant may run with the land, its performance or non-performance which run with the land, and those which are merely personal, and it is said that the authorities leave the application of old principles to new cases, — a very nice exercise of the mind, and more a matter for judicial discretion than almost any other of equal importance in the law of property. *Van Rensselaer v. Bonesteel*, 24 Barb. 367.

¹ *Spencer's Case*, *supra*, 2d resolution. *Hansen v. Meyer*, *supra*. So a covenant to insure a building covenanted to be erected by the lessor as parcel of the demise runs, although the word "assigns" is not used. *Masury v. Southworth*, 9 Ohio St. 340. Whether a covenant to deliver up would so run was doubted in *Sargent v. Smith*, 12 Gray, 426, and denied by Parke, B., in *Doe v. Seaton*, 2 C. M. & R. 730. *Verplank v. Wright*, 23 Wend. 506; *Wakefield v. Brown*, 9 Q. B. 209.

² *Spencer's Case*, *supra*, 2d resolution; *Dolph v. White*, 12 N. Y. 296; *Mayor, &c. v. Pattison*, 10 East, 130; *Curtis v. White, Clarke*, 389.

³ *Camp v. Scott*, 47 Conn. 366.

must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect its mode of enjoyment¹ [thus a mortgage, contained in a lease, of the crops to be raised on the premises, as a security for the rent, constitutes a covenant running with the land,² and so where the covenant is that the rent shall be a lien on the buildings and improvements.³ So a covenant in a lease with the privilege to make lime on the premises, that the lessee will "remove all rubbish and spalls" at the expiration of his term, is held to run with the land⁴]. The covenant must not only concern the land, but there must also be a privity of estate between the contracting parties;⁵ for if a party covenant with a stranger to pay a certain rent, in consideration of a benefit to be derived under a third person, it cannot run with the land, not being made with the person having the legal estate.⁶ [Thus, where the covenanting parties never had any interest in the land, their assignees are not bound.⁷ So a covenant by lessor with lessee not to exercise

¹ *Norman v. Wells*, 17 Wend. 136; see § 444, *post*; *Dunn v. Barton*, 16 Fla. 765; *Scheidt v. Belz*, 4 Bradw. (Ill.) 431.

² *Doty v. Heath*, 52 Miss. 530.

³ *Webster v. Nichols*, 104 Ill. 160. The covenant to pay taxes runs with the land. *West. Va. C. & P. R. R. v. McIntire*, 44 W. Va. 210. See § 341, *post*. So of the covenants in an oil lease to explore for oil, to work the wells, and to pay royalty. *Bradford Oil Co. v. Blair*, 113 Pa. St. 88; *Williams v. Short*, 155 *id.* 480, and see § 17 *a*, *ante*.

⁴ *Coppinger v. Armstrong*, 5 Bradw. (Ill.) 637.

⁵ The rule fully stated is, that in order to the *burden* of the covenant running with the land and binding the assigns of the covenantor there must have been a privity of estate between the contracting parties at the time of the contract; but the *benefit* of a covenant touching the land will run with the land though the covenantor is a stranger. This was settled as long ago as 42 Ed. III. 3; the case of the Prior and Convent, stated and followed in *Spencer's Case*, 5 Co. 16, is well-established law, and is the ground of recovery on covenants of title by assignees of a grantee in fee. The former has been much debated, but is, on the whole, settled as stated, *supra*. *Dennett v. Atherton*, L. R. 7 Q. B. 316, 326.

⁶ *Demarest v. Willard*, 8 Cow. 206; *Wooliscroft v. Norton*, 15 Wis. 198; *Webb v. Russell*, 3 T. R. 393; *Allen v. Wooley*, 1 Blackf. 148. But see *Willard v. Tillman*, 2 Hill, 274.

⁷ *Hurd v. Curtis*, 19 Pick. 459; *Bronson v. Coffin*, 108 Mass. 180; *Plymouth v. Carver*, 16 Pick. 183; *Keppel v. Bailey*, 2 Myl. & K. 517.

a particular trade on another parcel of lessor's land does not bind a grantee of the latter parcel, for *quoad hoc* they are strangers.¹] But if the assignee of the reversion or term come in of a different estate to that held by the lessor or lessee, he cannot sue or be sued on the covenants running with the land, for want of privity.² Thus if a party, having

¹ Taylor v. Owen, 2 Blackf. 301.

² Co. Lit. 215; 1 Saund. 240, a. Though there should be a total want of right in the original covenantor, if his deed transfers the possession, and that possession passes by subsequent conveyances, the original covenants pass therewith. The naked possession is an estate, and covenants real before breach pass with it. Beddoe v. Wadsworth, 21 Wend. 120. Thus, the covenant made by the donee of a power of appointment will not bind his appointees, as they do not succeed to his estate, but to the donor's. Roach v. Wadham, 6 East, 289. So, where covenants are not annexed to the reversion to which plaintiff succeeds. Cardwell v. Lucas, 2 M. & W. 111; Cooch v. Goodman, 2 Q. B. 580. On this principle a privilege granted by an owner to an abutting owner, for the benefit of the latter's estate, is personal, and does not pass to a lessee of the latter. People v. C. & N. W. R. R., 57 Ill. 436. In equity it seems settled that the want of privity will not relieve an assignee from the burden of a covenant relating to the premises of which he has full notice before the assignment; and Keppel v. Bailey, *supra*, is so far overruled. Luker v. Dennis, 7 L. R. Ch. Div. 227. So, since the statute of *quia emptores*, which abrogated privity of estate and tenure between grantor and grantee on a conveyance in fee, covenants thereon will not run with the land to bind assigns; as, for instance, to pay rent, it being a rent charge. Brewster v. Kidgill, 12 Mod. 166, explained in 1 Smith Lead. Cas. 32; Coke v. Arundel, Hardr. 87. But where this statute is not in force privity exists between lessor and lessee in fee; the rent reserved is a rent service, and a covenant to pay it binds the assigns of a lessee. Dunbar v. Jumper, 2 Yeates, 74; Ingersoll v. Sargent, 1 Whart. 348; Royer v. Ake, 3 Pa. 461; Herbaugh v. Zentmyer, 2 Rawle, 159; Hannen v. Ewalt, 18 Pa. St. 9. So Wallace v. Harmstad, 44 Pa. St. 492; although it is denied that this flowed from fealty or any feudal relation. In New York, the law was so held: Van Rensselaer v. Bradley, 3 Den. 135; until 1852, when the case of Depeyster v. Michael, 6 N. Y. 467, held that, by statutes of 1779 and 1787, the statute of *quia emptores* had been re-enacted, and no tenure of privity existed on a lease in fee. This, denying privity, seemed to conclude any liability of the assignee of the lessee in fee on the latter's covenants touching the land. But in Van Rensselaer v. Hays, 19 N. Y. 68, the law was held otherwise by force of statute 1805, c. 98; and though the rent was a rent charge and not a rent service, the assignee was bound to its payment. The statute of 1805 was repealed in 1860, c. 396; but

only an equitable estate in a freehold, grants a lease, and then devises the estate to A., and after the death of the testator, A. acquires the legal estate from the person in whom it was vested at the time of the lease and devise, and then sells and conveys the legal estate to B., the latter cannot sue the lessee or his assignee, because he is not in of the same estate as the lessor.¹ There is no difference, however, between express and implied covenants, with respect to their running with the land;² but mere equitable covenants do not run with the land.³ It is to be observed that those covenants

the same doctrine was decided to exist at common law; *Van Rensselaer v. Read*, 26 N. Y. 558; while in *Same v. Slingerland*, *id.* 580, the statute of 1846, c. 274, was held to give the same rights in ejectment; and these in *Same v. Denison*, 35 *id.* 93, were held to exist by common law on conditions in deed, and that the statute of 1787 only affected conditions in law; and these doctrines were adopted in *Tyler v. Heidorn*, 46 Barb. 439, after a full review of the cases, the ground taken being that the reservation of a rent in fee, like its grant, created an incorporeal hereditament, producing privity and a right and liability on the covenants annexed. And in *Van Rensselaer v. Barringer*, 39 N. Y. 9, *Hosford v. Ballard*, *id.* 147, *Lyons v. Adde*, 63 Barb. 89, the law was declared settled beyond discussion.

¹ *Whitton v. Peacock*, 2 Bing. N. C. 411.

² *Vyvyan v. Arthur*, 1 B. & C. 410; *Crowe v. Riley*, 63 Ohio St. 1.

³ *Whitton v. Peacock*, *supra*. Covenants are spoken of as running with the land. How far they run with incorporeal interests in land the cases are not agreed. In England the benefit of a covenant to pay rent will not run with the rent alone. *Milnes v. Branch*, 5 M. & S. 411; per Parke, B., *Randall v. Rigby*, 4 M. & W. 135; but a covenant to pay tithes ran with the tithes. *Bally v. Wells*, 3 Wils. 25; and see *Egremont v. Keene*, 2 Jones, Exch. 307; *Muskett v. Hill*, 5 Bing. N. C. 694; *Williams v. Hayward*, 1 Ellis & E. 1040. In this country, it has been thought that a covenant to pay rent on a lease for life or years will run with the rent alone. See *Willard v. Tillman*, 2 Hill, 274; *Demarest v. Willard*, 8 Cow. 206; *Patten v. Deshon*, 1 Gray, 325. And the same was held of rent on a lease in fee in Pennsylvania. *Streaper v. Fisher*, 1 Rawle, 155; *St. Mary's Church v. Miles*, 1 Whart. 229; *Scott v. Lunt*, 7 Pet. 596. But the sounder view is otherwise both with regard to both classes of rents. *Allen v. Wooley*, 1 Blackf. 148; *Willard v. Tillman*, 2 Hill, 276; *Devises Van Rensselaer v. Platner*, 2 Johns. Cas. 24; *Irish v. Johnston*, 11 Pa. St. 488. And it was held that such a rent is not a vested estate, but rests in contract only, and is liable to be defeated by an alteration therein. *Wallace v. Harmstad*, *supra*. In New York, however, by the statute of 1805, assignees of a rent-charge were held

only can run with the land which arise out of instruments under seal.¹

§ 262. **Specific Covenants running with the Land.** — All covenants which are implied in law run with the land. So, also, do covenants for quiet enjoyment;² to insure, if the insurance is to be laid out in rebuilding;³ for further assurance;⁴ to repair⁵ [and even to pull down and put up⁶]; to insure, if the proceeds are to be applied in the restoration of the buildings in case of loss;⁷ to abstain from carrying on any offensive trade upon the premises;⁸ to discharge the lessor from taxes and assessments, ordinary or extraordinary;⁹ to permit the lessor to have free passage to two rooms ex-

entitled to maintain covenant therefor. *Van Rensselaer v. Hays*, 19 N. Y. 68. And after the repeal of this statute, in 1860, the same right was held to exist at common law. *Van Rensselaer v. Read*, 26 *id.* 558; *Tyler v. Heidorn*, 46 Barb. 439. At common law, covenants, it seems, would run with a transfer of the possession of land without title on the ground of estoppel, if the want of title did not appear by the pleadings. *Beddoe's Ex'or v. Wadsworth*, 21 Wend. 120; *Slater v. Rawson*, 6 Met. 439; *Fowler v. Poling*, 2 Barb. 300; *Barker v. McCoy*, 3 Ohio, 211; *Foote v. Burnet*, 10 *id.* 317; *Devore v. Sunderland*, 17 *id.* 52; *Dickinson v. Hoomes*, 8 Gratt. 353; *Webb v. Austin*, 8 Scott, N. R. 419; *Gouldsworth v. Knights*, 11 M. & W. 337. But if the want of title appeared, the action will fail. *Noke v. Awder*, Cro. El. 373, 436; *Andrews v. Pearce*, 4 B. & P. 158; *Pargeter v. Harris*, 7 Q. B. 708; *Carvick v. Blgrave*, 1 Br. & B. 531.

¹ *Elliott v. Johnson*, 8 B. & S. 38, per Lush, J.

² *Suydam v. Jones*, 10 Wend. 180; *Hunt v. Amidon*, 4 Hill, 345; *Noke v. Awder*, Cro. El. 436; *Campbell v. Lewis*, 3 B. & A. 392.

³ *Vernon v. Smith*, 5 B. & A. 1; *Thomas v. Van Kapff*, 6 Gill & J. 372.

⁴ *Middlemore v. Goodale*, Cro. Car. 503; *Roe v. Hayley*, 12 East, 464; *Bennett v. Waller*, 23 Ill. 97.

⁵ *Demarest v. Willard*, 8 Cow. 206; *Dean and Chapter of Windsor's Case*, 5 Co. 24; *Shelby v. Hearne*, 6 Yerg. 512; *Kingdon v. Nottle*, 1 M. & S. 355. So *Myers v. Burns*, 33 Barb. 401; *Payne v. Haine*, 16 M. & W. 541.

⁶ *Harris v. Goslin*, 3 Harringt. 340. So, on a demise of a cottage for hunting, a covenant to leave the land well stocked runs. *Hooper v. Clark*, 8 B. & S. 150.

⁷ *Thomas v. Van Kapff*, 6 Gill & J. 372.

⁸ *Barron v. Richards*, 3 Edw. 96.

⁹ *Post v. Kearney*, 2 N. Y. 394; *Martin v. Baker*, 5 Blackf. 232.

cepted in the demise;¹ to cultivate the land in a particular manner;² or to cultivate with laborers from a particular locality;³ to maintain a partition fence;⁴ [to conduct the lessee's business upon the premises strictly according to law⁵]; not to carry on particular trades;⁶ not to assign;⁷ not to erect any building in front of the demised premises;⁸ nor to permit a building to be used otherwise than as a dwelling-house;⁹ nor to put in operation a rival mill;¹⁰ or, it would seem, to pay for trees planted, for fixtures, or for permanent improvements by the lessee.¹¹ [The lessor's covenant that the lessee shall have the right to occupy, during his term, such portion of lands as he shall clear and reduce to cultivation, runs with the land and binds the assignee of the reversion.¹²] A covenant by a lessor to supply houses with water, at a rate therein mentioned for each house, also runs with the land, and for a breach of it the assignee of the lessee may maintain an action against the reversioner.¹³ But covenants to name an arbitrator to make a

¹ *Cole's Case*, 1 Salk. 196; *Bush v. Calis*, 1 Show. 389.

² *Cockson v. Cock*, Cro. Jac. 125.

³ *Mayor of Congleton v. Pattison*, 10 East, 130.

⁴ *Kellogg v. Robinson*, 6 Vt. 276.

⁵ *Crowe v. Riley*, 63 Ohio St. 1.

⁶ *Tatem v. Chaplin*, 2 H. Bl. 133.

⁷ *Williams v. Earle*, 9 B. & S. 740, 753. It is held that a covenant that the lessee shall have a right to sublet runs with the land, and that under it the lessee may assign. *Menger v. Wood*, 87 Tex. 622.

⁸ *Trustees v. Cowen*, 4 Paige, 510. But *Thomas v. Hayward*, L. R. 4 Exch. 311, is otherwise.

⁹ *St. And. Ch. App.*, 67 Pa. St. 512.

¹⁰ *Norman v. Wells*, *supra*; *Vyvyan v. Arthur*, 1 B. & C. 410.

¹¹ *Stockett v. Howard*, 34 Md. 121; *Gorton v. Gregory*, 3 B. & S. 90, 99. In *Elliott v. Johnson*, 8 *id.* 38, it seems admitted that the assignee could have sued on the covenant; and on the principle of *Minshull v. Oakes*, cited § 260, *ante*, such a covenant would seem to run, though assigns were not named. A contrary doctrine to that stated in the text is sometimes advanced, but is not borne out by authority. In *Grey v. Cuthbertson*, 4 Doug. 351, the covenant sued on was not for a valuation, but for appointing an appraiser; and in *Coffin v. Talman*, such a covenant was held not continuous or capable of affecting an assignee after a breach.

¹² *Callan v. McDaniel*, 72 Ala. 96; *McDaniel v. Callan*, 75 Ala. 327.

¹³ *Jourdain v. Wilson*, 4 B. & A. 266.

valuation ;¹ not to permit a grist-mill to be erected ;² or to pay the cost of a party-wall, are not of this description.³ Where there was an exception, in the lease of an entry, of liberty to wash in the kitchen and a passage there for that purpose, it was held that an action would lie against an assignee for hindering the lessee, because a covenant relating to a way, or other profit appurtenant, goes with the tenement and binds the assignee.⁴ The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion. So the grant of an additional term or of a right to purchase is, for many purposes, to be considered a continuation of the former lease ; and if there is nothing in the lease to show that such right or renewal was intended to be confined personally to the lessee, it will enure to his assignees or executors without these being particularly named.⁵ Covenants running with the land are divisible, and will bind the assignee of a part of the estate demised, in respect to the parcel assigned to him, as to repair, or to pay rent of the part occupied by him.⁶ [Where a covenant running with the land is divisible, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro*

¹ *Grey v. Cuthbertson*, *supra*.

² *Harsha v. Reid*, 45 N. Y. 415.

³ *Curtis v. White*, Clarke's Chan. 389; *Brown v. McKie*, 57 N. Y. 684. So a parol agreement to pay more rent for an additional story to be erected by lessor does not pass to the assignee. *Coit v. Braunsdorf*, 2 Sweeny, 74.

⁴ *Bush v. Calis*, 1 Show. 389.

⁵ *Piggot v. Mason*, 1 Paige, 412; *Winslow v. Tighe*, 2 Ball & B. 195; *Randall v. Russell*, 3 Mer. 196; *Hyde v. Skinner*, 2 P. Wms. 196; *Roe v. Hayley*, 12 East, 469; *Vernon v. Smith*, 5 B. & A. 11; *Wilkinson v. Pettit*, 47 Barb. 230; *Barclay v. Steamb. Co.*, 6 Phila. 558. Thus the right to have a conveyance of the premises during or at the end of the lease at a fixed price passes. *Napier v. Darlington*, 70 Pa. St. 64; *Willard v. Taylor*, 8 Wall. 557; *Hagar v. Buck*, 44 Vt. 285.

⁶ *Stevenson v. Lambard*, 2 East, 575. A contract to sell and purchase at the lessee's option, during the term, inserted in the lease, may be independent, or may fall with the estate demised, and ordinary rules of construction are to be applied to ascertain the meaning of the whole instrument. *Ober v. Brooks*, 162 Mass. 102.

tanto; and the assignee of each parcel will be answerable for a proportionate part of the common burden, and will be exclusively liable for the breach of any covenant which related to his part alone.^{1]}

§ 263. **Personal, as not concerning Land, bind Covenantor only.** — A personal covenant is one which does not affect the land demised, being merely collateral to it. Instead of running with the land and binding those who enter into possession as assignees, it affects only the covenantor during his lifetime, and the assets of his estate in the hands of its representatives after his death, by reason of the privity of estate. Of this description are covenants of seisin, of a right to convey, and against incumbrances.² If these are not true, there is a breach of them as soon as the deed is executed, and the lessee's right of action is at once complete; but, being mere *choses in action*, they are [generally held] not to be assignable.³ So a covenant on the part of the lessor to pay the lessee, without including his assigns, for a building not yet erected, but which is to be built during the term, does not run with the land.⁴ Nor are the lessor's covenants to pay the debt of a third person, to surrender certain personal chattels, or to pay the lessee for chattels replaced by him during the term, binding upon an assignee.⁵

¹ *Astor v. Miller*, 2 Paige, 68; *Van Horne v. Crain*, 1 *id.* 455; *Shep. Touch.* 199; *Co. Lit.* 885, a.

² *Sprague v. Baker*, 17 Mass. 588; *Gilbert v. Bulkley*, 5 Conn. 262; *Pilsbury v. Mitchell*, 5 Wis. 17; *Redwine v. Brown*, 10 Ga. 311.

³ 4 Kent, Com. 459; *Greenby v. Wilcocks*, 2 Johns. 1; *Birney v. Hann*, 3 A. K. Marsh. 322; *Chapman v. Holmes*, 5 Halst. 20; *Bingham v. Weiderwax*, 1 N. Y. 509; *Mitchell v. Hazen*, 4 Conn. 459; *Innes v. Agnew*, 1 Ohio, 886; *Bickford v. Page*, 2 Mass. 455. For the same reason, covenants that are broken before an assignment do not pass as incident to the land. *Shelby v. Hearne*, 6 Yerg. 512. But the law is otherwise where such covenants are held to run with the land. *Kingdon v. Nottle*, 4 M. & S. 53; *Martin v. Baker*, 5 Blackf. 232; *Devore v. Sunderland*, 17 Ohio, 52; *Dickson v. Desire*, 23 Mo. 151; and so in Maine, by Rev. Stat. c. 115, § 16.

⁴ *Thompson v. Rose*, 8 Cow. 266.

⁵ *Dolph v. White*, 12 N. Y. 296; *Allen v. Culver*, 3 Den. 284; *Gorton v. Gregory*, 3 B. & S. 90.

§ 264. **Joint or Several. — Joint and Several.** — Covenants may be either joint or several, and are sometimes both joint and several. But whether a covenant is joint or several depends upon the subject-matter of the covenant, and the interest that passes by it, and not upon the precise language used in the instrument of demise. The interest which the covenantees have in the performance of the covenant, will generally determine the question whether the right of action upon it is joint or several.¹ If the interest is joint, the action must be in the name of all the covenantees, although the words of the covenant are several. But if the interest of the covenantees is several, the covenant will be several, although the terms of it be joint.² If two lessees covenant jointly and severally at the beginning of a lease, the effect of these words extends to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor.³ And where one covenants with two or more, and with each of them, if each covenantee takes a several interest or estate, the covenant is several; but where the interest is joint, the word "each" makes no difference, and does not create separate covenants.⁴ It has been held that a covenant with two, and every of them, was joint; although the two were several parties to the deed;⁵ for there is a difference where the parties covenant jointly and severally, and where the covenant is with them and every of them: in the former case the covenantees may have separate actions. And though a covenant with several persons be joint and several in the terms of it, yet, if the legal interest and cause of action be joint, the action must be brought by all the covenantees; on the other hand, if the interest and cause of action be several, the action

¹ *Slingsby's Case*, 5 Co. 18, b; *Lahy v. Holland*, 8 Gill, 449; *James v. Emery*, 8 Taunt. 245; *Quackenboss v. Lansing*, 6 Johns. 49; and per Denman, C. J., in *Hopkinson v. Lee*, 6 Q. B. 964, 970.

² Per Gibbs, J., in *James v. Emery*, *supra*; *Jacobs v. Davis*, 84 Md. 204; *Withers v. Bircham*, 8 B. & C. 254.

³ *Northumberland v. Errington*, 5 T. R. 522.

⁴ *Anderson v. Martindale*, 1 East, 497; *Mansell v. Burredge*, 7 T. R. 852.

⁵ *Southcote v. Hoare*, 8 Taunt. 87; *Sorsbie v. Park*, 12 M. & W. 146.

may be brought by one only although the terms of the covenant be joint.¹ On a joint covenant by two, if one die, the survivor only can be sued at law; and if both are dead, the representatives of the last living are alone answerable.²

§ 265. **Dependent, when each is Consideration of the other.** — Whether covenants are dependent is to be collected from their sense, and the expressed meaning of the parties, and not from merely technical words in the instrument; and their precedence depends on the order of time in which the intent of the transaction requires their performance, and not on the order in which they stand in the deed.³ [Thus a covenant not to injure crops and a covenant to pay the amount of such injury found by arbitrators are independent, and suit may be brought for the injury although there is no arbitration.⁴] Dependent covenants are in the nature of conditions, and are precedent each to the other; and the non-performance of one is not only a defence to the exaction of performance by the other, but is ground for an action without a tender of performance by the other.⁵ If, however, they are independent, as where a landlord engages to keep the premises in repair or to place certain improvements upon them within a specified time, his non-performance does not in either case discharge the tenant's covenant to pay rent.⁶ [Where one agreed to labor, and the other to furnish a house for him during the time he was to labor, the covenants were held to be inde-

¹ *Ludlow v. McCrea*, 1 Wend. 228; *Catlin v. Barnard*, 1 Aik. 9.

² *Rowan v. Woodward*, 2 A. K. Marsh. 140. A joint judgment cannot be sustained against two under-tenants, who may each be liable for rent, where it appears that there was no joint occupation. *Pierce v. Minturn*, 1 Cal. 470.

³ *Tompkins v. Elliott*, 5 Wend. 496; *Jones v. Barkley*, 2 Doug. 684; *Gardiner v. Corson*, 15 Mass. 504; *Parmelee v. Oswego & S. R. R.*, 6 N. Y. 74; *Grant v. Johnson*, 5 *id.* 247; *Selden v. Pringle*, 17 *id.* 458; *Crocker v. Hill*, 61 N. H. 349.

⁴ *Dawson v. Fitzgerald*, 1 L. R. Exch. Div. 257.

⁵ *West v. Emmons*, 5 Johns. 179; *Slocum v. Despard*, 8 Wend. 615; *Morris v. Sliter*, 1 Den. 59; *Couch v. Ingersoll*, 2 Pick. 292.

⁶ *Tibbitts v. Percy*, 24 Barb. 39; *Ellis v. M'Cormick*, 1 Hilt. 313. See § 331, *post*.

pendent.¹ A covenant by a lessor that the lessee paying the rent and performing the covenants shall quietly enjoy, is not a conditional covenant, and a plea stating the non-payment of the rent, or the non-performance of a covenant by the lessee to insure, is not a bar to an action by the lessee on the covenant for quiet enjoyment.² Covenants that the lessee shall pay taxes, and the lessor shall permit the removal of the lessee's improvements, are independent; and the lessee may enforce the lessor's undertaking, in equity, without showing payment of the taxes. The obligation of a covenant to pay taxes attaches to the time of the assessment.³ The covenants to pay rent and to repair are independent.⁴] But where acts are to be done simultaneously, and each is the consideration of the other, the covenants are dependent,⁵ and neither party can recover against the other without showing performance or an offer to perform on his own part. The courts are generally averse to construing covenants to be independent of each other unless the intention of the parties to that effect is clearly manifest, since it is manifestly unjust that one party should refuse to be bound, and yet be allowed to enforce performance against the others.⁶ [Where a lease gives the lessee the privilege of purchasing the demised premises at any time during the term, upon the payment of a stipulated sum to the lessors, the covenants for the payment by the lessee, and for a conveyance by the lessors, are mutual and dependent, and neither party can put the other in default without tendering a performance on his part, unless the other party waives such performance.⁷ Although, where mutual

¹ *Betts v. Perrine*, 14 Wend. 219.

² *Dawson v. Dyer*, 5 B. & Ad. 584.

³ *Strohermeyer v. Zeppenfeld*, 28 Mo. App. 268.

⁴ *Piper v. Fletcher*, 115 Iowa, 263.

⁵ *Dakin v. Williams*, 11 Wend. 67; *Day v. Essex Bank*, 13 Vt. 97; *Parker v. Parmele*, 20 Johns. 136; *Butler v. Many*, 52 Mo. 497.

⁶ *Mecum v. Peoria R. R. Co.*, 21 Ill. 533; *Pegues v. Mosby*, 17 Miss. 569; *Clopton v. Bolton*, 28 *id.* 78; *Bangs v. Lowber*, 2 Cliff. 157.

⁷ *Heine v. Treadwell*, 72 Cal. 217. A lessor covenanted to make all necessary repairs upon the outside of the buildings upon the demised premises upon notice; and there were mutual covenants that, if the buildings should be destroyed or made untenable by fire, either party

covenants go to the whole consideration of the contract on both sides, they are equivalent to mutual conditions, the one precedent to the other; yet where they go only to a part of the consideration and where a breach may be paid for in damages, the defendant has a remedy on his covenant, and may not set it up as a condition precedent. In such a case, the injured party has the right to treat the entire contract as broken and to recover damages for a total breach.¹]

§ 266. **Void when Deed is void or there is no Estate in the Covenantor.** — Covenants may be void when considered with reference to the instrument in which they are contained, as well as to the estate on which they depend. Thus, where a deed is void, all the covenants dependent on the interest professed to be conveyed by it are also void.² And a lessee professing to assign over a term, which in fact had no existence, is not liable at the suit of a subsequent assignee on a covenant for quiet enjoyment.³ The same rule holds where a lease is void for uncertainty; as where one possessed of a term for years granted so much of the term as should be unexpired at the time of his death, and the grantee assigned and covenanted with the assignee for quiet enjoyment; it was held that the uncertainty annulled the original lease, and that the covenant could not subsist without an estate, and as no estate passed, the assignee could not maintain an action.⁴

might terminate the lease upon notice to the other. Upon the destruction of the buildings during the term, and a demand by the lessee upon the lessor to rebuild them, and a refusal to rebuild in a reasonable time, neither party giving notice to terminate the lease, it was held that the lessee was liable for the damages in an action of covenant broken. *Crocker v. Hill*, 61 N. H. 845. A covenant by the terms of which the lessor agrees upon the expiration of the term to pay for any improvements which the lessee might put upon the land under a permission therefor in the lease, without any covenant by the lessee to make improvements, is a personal covenant upon the part of the lessor, and not one which can be enforced against one who purchases the land after the breach of such covenant. *Gardner v. Samuels*, 116 Cal. 84.

¹ *Union Pacific Railway v. Traveler's Ins. Co.*, 49 U. S. App. 752.

² *Soprani v. Skurro*, Yelv. 18; *Capenhurst v. Capenhurst*, 1 Lev. 45.

³ *Noke v. Awder*, Cro. El. 873; s. c. *id.* 436.

⁴ *Capenhurst v. Capenhurst*, T. Ray. 27; *Waller v. Dean of Norwich*

§ 267. **Illegal, or against Public Policy, void.** — A covenant to do a thing, which appears obviously to be prejudicial to the public interest, or contrary to law, is void.¹ The courts will not aid either party in enforcing an illegal executory contract; nor, if executed, will they assist in setting it aside, or in recovering back what has passed under it² [and the assignee of such a contract stands in no better position than his assignor³]. So, if made within the prohibition of a statute, the covenant is void, although the act be merely prohibitory in its terms.⁴ [If a part of the contract is void, the whole is void.⁵] If a man covenants not to do a thing which it is otherwise lawful for him to do, and a subsequent statute compels him to do it, the act annuls the covenant; or if he covenants to do a lawful thing, and afterwards a statute annuls it, the covenant becomes void. But if he covenants to do a thing which is unlawful at the time, and, afterwards, a statute makes it lawful, the covenant is not thereby annulled.⁶ Or if he covenants to do a thing which is unlawful by statute, the covenant will not be made lawful by a repeal of the statute; for the covenant was void *ab initio*.⁷ A covenant to do an impossible thing is void; but the impossibility must exist at the time of making the covenant, for if it be then possible, and afterwards becomes impossible, the covenantor will still be liable upon the express words of his covenant.⁸

Owen, 136; *Waters v. Same*, 2 Brownl. & G. 158; *Wade v. Merwin*, 11 Pick. 280; *Phelps v. Decker*, 10 Mass. 267.

¹ *Lowe v. Peers*, 4 Burr. 2225; *Shep. Touch.* 163; *Pratt v. Adams*, 7 Paige, 615; *Smith v. Albany*, 7 Lans. 14.

² *Nellis v. Clark*, 20 Wend. 24; s. c. 4 Hill, 424; *Chamberlin v. Barnes*, 26 Barb. 160, 163.

³ *Saratoga Bk. v. King*, 44 N. Y. 87.

⁴ *Norwich v. New Berlin*, 18 Johns. 382; *Powers v. Shepard*, 48 N. Y. 540; *Barton v. Port Jackson Co.*, 17 Barb. 397.

⁵ *Crawford v. Morell*, 8 Johns. 253.

⁶ *Brick Presb. Ch. v. Mayor*, 5 Cow. 538; *Heskeath v. Grey*, Buller, N. P. 165; 1 Salk. 198. But see *Benson v. Dean*, 3 Mod. 39.

⁷ *Jaques v. Withy*, 1 H. Bl. 65.

⁸ *Blight v. Page*, 3 B. & P. 294; *Paradine v. Jane*, Aleyn, 26; *Hickman v. Raye*, 55 Ind. 551. In *Hills v. Thompson*, 13 M. & W. 487, the lessee covenanted to raise a given quantity of coal or pay a certain rent. He was held to this, though there was not so much coal in the lot demised.

§ 268. **Oppressive, Equity will not enforce.**—Although a covenant may not be absolutely void or illegal, it may yet be of so hard and oppressive a character, that a court of equity will refuse to enforce it. Thus, where a lease of mines contained a covenant that if the lessor should, at any time before the expiration or termination of the lease, give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, or implements, in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein provided for; this was held to be a covenant so injurious and oppressive to the lessee that the court would not enforce it, or grant an injunction to prevent a breach of it.¹

§ 269. **How discharged. — How released by Act of Covenantor.**—A covenantor cannot, by any act of his own, short of performance, discharge or any manner qualify his express covenant, without the concurrence of the covenantee.² Nor can the covenantee himself discharge it by an instrument which is not under seal.³ But any positive act of prevention by the covenantee will release the covenantor from performance; as, if a man covenants with another to collect his rents in a certain town, and then in some way prevents or interrupts him;⁴ or if a lessee for years covenants to drain the water out

In *Clifford v. Watts*, L. R. 5 C. P. 577, however, an agreement by lessee to dig not less than 1000 tons of clay was held excused if there was not so much to be found. It is said that there are two cases where the covenantor is held notwithstanding a physical impossibility: *first*, where it supervenes after the making of the covenant, whether by act of God or of some agency other than the covenantee; *second*, where the covenantor warrants the possibility.

¹ *Talbot v. Ford*, 13 Sim. 173.

² *Stone v. Dennis*, 3 Porter, 231; *Clancy v. Overman*, 1 Dev. & B. 402.

³ *Harper v. Hampton*, 1 H. & J. 622.

⁴ *Shaw v. Hurd*, 3 Bibb, 371; *Borden v. Borden*, 5 Mass. 67. Where a lease contains a "chattel mortgage clause" to secure the performance of covenants, the election of the lessor to terminate the lease for breach of covenant does not discharge the mortgage lien. *Ludlum v. Rothschild*, 41 Minn. 218.

of the land, or to build a house before such a day, and the lessor enters before that day, and holds the lessee out.¹ But the covenant would not be dispensed with, if the covenantee merely forbids the covenantor to proceed with the draining or building.²

§ 270. **Performance rendered impossible by one Party, Rights of other Party may be enforced.** — Where the act of one party hinders the performance of a covenant by the other, performance is excused, and the thing contracted to be done by the former may be enforced by suit, without averring performance; and proof of such conduct will support the averment of performance.³ So the omission of the covenantee to do some act necessary on his part to the execution of the covenant may be a ground for excusing the covenantor; as, if a man covenants to convey an estate to another for his life and the lives of two such other persons as the covenantee shall name, and to deliver quiet possession before the Christmas following, the neglect of the covenantee to name the lives is an excuse for the non-performance of the covenant by the covenantor.⁴ So, where the whole consideration fails, and a stipulation, by the voluntary act of either, becomes incapable of being substantially performed in the manner intended by the parties; then the other is not bound to proceed, but may decline performance on his own part.⁵ And if performance of another thing, or at another time, is accepted in lieu of the thing to be done or the time stipulated, this is a sufficient excuse for the non-performance of the letter of the contract.⁶ The voluntary destruction of one of the seals of a deed where the covenants are joint will discharge both covenantors; but if the covenants are several, the breaking of one of the seals by a covenantee will invalidate the instrument only so far as

¹ *Carrel v. Read*, Cro. El. 374.

² *Barker v. Fletwell*, Godb. 69; *Porter v. Stewart*, 2 Aik. 427.

³ *Marshall v. Craig*, 1 Bibb, 379; *Couch v. Ingersoll*, 2 Pick. 292; *Farnham v. Ross*, 2 Hall, 167.

⁴ *Twyford v. Buntly*, Freem. 121; *Parker v. Parmele*, 20 Johns. 130; *Edwick v. Hawkes*, 18 Ch. D. 199.

⁵ *Kleine v. Catara*, 2 Gallis. 74.

⁶ *Warren v. Maima*, 7 Johns. 476.

concerns him whose seal is taken off.¹ But where the seals are torn off by a stranger, or by one with whom the instrument was left for safe-keeping, this does not vitiate the deed, and an action of covenant may still be maintained on it.²

SECTION II.

OF CONDITIONS.

§ 271. **Defined. — In Law or Deed. —** A condition is a qualification annexed to an estate by the grantor, whereby the estate may be enlarged, defeated, or created, upon an uncertain event. To be effectual, the words used must import that the vesting or continuance of the estate is to depend upon the supposed contingency. A condition may apply to a lease, as well as to a conveyance in fee. It may be inserted in the lease, or indorsed upon it, or contained in a separate instrument; provided that such indorsement or separate instrument shall have been executed contemporaneously with the lease.³ Conditions are either in law or in deed. A condition in deed is that which is expressed in the deed by which it is created; a condition in law is that which arises by necessary implication from the circumstances of the case. The doctrine of estates upon condition in law is said to be of feudal derivation. There was a tacit condition annexed to every tenancy, that the tenant should not do any act to the prejudice of the reversion. If he committed waste, or did any other act which, in law, tended to defeat or divest the estate in reversion, the particular estate was forfeited. Even the rents and services of the feudatory were considered as conditions annexed to his fief; and for the non-payment or non-performance of any of

¹ Matthewson's Case, 5 Co. 22, b; Collins v. Prosser, 1 B. & C. 682; s. c. 3 Dow. & Ry. 112.

² Rees v. Overbaugh, 6 Cow. 746. And see § 165, *ante*.

³ Griffin v. Stanhope, Cro. Jac. 456; Craig v. Wells, 11 N. Y. 315; Van Rensselaer v. Ball, 19 *id.* 100. In New York a stipulation for the payment of rent, in a conveyance in fee, with a right of re-entry to the grantor or his heirs in default of payment, is held to be a condition to the grant. *Ibid.*

these, the lord might re-enter without a reservation to that effect in the deed creating the estate.¹ A condition has strictly for its object the defeating or avoiding an estate; but where an estate is to be created or enlarged, it is technically upon a limitation, the province of which is, to mark the period or event for the commencement, and the time of duration of the estate, whether it be in fee, for years, or for life, and which therefore relates to the determinable qualities of an estate.²

§ 272. **In Law, are Absolute Limitations of the Estate. — In Fact, are Provisos merely.** — Conditions in law are of the nature of limitations, by which, upon the happening of a contingency, the estate becomes *ipso facto* terminated. As, if an estate be made to A. for years, if S. so long live, this is a limitation by which the estate of A. is terminated immediately upon the death of S. Or, if an estate be granted to a man and his wife during coverture, they have an estate for life, liable to become extinct upon the dissolution of the coverture; and upon such a limitation, the next subsequent estate becomes vested immediately upon the determination of the first estate, and the remainder-man may enter.³ But a condition in a deed is only a proviso that the grantee shall or shall not do a particular act; and a breach of it will not, *ipso facto* or without entry, defeat the estate, but only give the grantor, his heirs or assigns, a right to re-enter, and, by such re-entry, to avoid the estate.⁴ Partaking of the nature of the lease to which it is attached, a condition annexed to a term of years may be

¹ 4 Kent, Com. 121.

² A clause in a lease, that the lessee will deliver up the premises and all the buildings and repairs put thereon by him, on three months' notice, and the payment to him of two hundred and fifty dollars, is not a condition but a covenant, and the lessee's estate is not determined by an offer of the lessor to pay him that sum. *Wheeler v. Dascomb*, 8 Cush. 285.

³ Co. Lit. 214, b; *Mary Portington's Case*, 10 Co. 41; *Shep. Touch.* 117.

⁴ A clause in a lease providing for its termination at the lessor's election, on default of rent, although in the form of a mere stipulation, is still a condition; since it provides for ending the term and the forfeiture of the estate in case of a default. *Horton v. N. Y. Cent. R. R.*, 12 Abb. N. C. 80. So where the provision is that failure to pay shall be considered an abandonment. *Bowyer v. Seymour*, 18 W. Va. 12.

created by parol, when the lease is so created ; but a condition annexed to a freehold lease can be only by deed.¹

§ 273. **Conditions and Limitations, distinguished.** — The principal difference between a condition and a limitation is, that a breach of a condition does not defeat the estate until an act, such as a re-entry, of the grantor or heirs ; but a limitation marks the period which is to determine the estate, without entry or claim,² and no act is necessary to vest the right in him who has the next expectant interest.³ Whether a particular form of words amounts to a condition, a limitation, or a covenant, is matter of construction, depending upon the true intent and meaning of the contract. Thus, where a lease contained a clause that, in case of a violation of any of its conditions, the relation of landlord and tenant should, at the option of the landlord, wholly cease, it was held that this did not amount to a conditional limitation, which would absolutely determine the estate by the mere breach of the condition.⁴ [And, in general, where a lease provides that the landlord “ may ” re-enter, upon the breach of a condition, the lease is not avoided by a breach, but only made voidable at his election ; and the estate will continue after breach, unless the landlord exercises his election.⁵] The intention of the party

¹ Co. Lit. 214, b. Where an estate is so limited that it cannot endure longer than until the contingency happens upon which it is to fail, this is a limitation. But when an estate is granted upon condition in deed, the law permits it to endure beyond the time of the contingency happening unless the grantor takes advantage of the breach of condition by entering. And this rule applies to estates for years, even where the condition is that the estate shall be void. See §§ 288, 492, *post*.

² *Stearns v. Godfrey*, 16 Me. 160; *Johnson v. Godfrey*, 52 Tex. 222; 1 Prest. Est. 45.

³ *Den v. Hance*, 6 Halst. 244; 1 Prest. Est. 46.

⁴ *Beach v. Nixon*, 9 N. Y. 35.

⁵ *Stuyvesant v. Davis*, 9 Paige, 427; *Arnsby v. Woodward*, 6 B. & C. 519; *Dakin v. Cope*, 2 Russ. 174; *Meni v. Rathbone*, 21 Ind. 454. So though the stipulation is that it shall become void and lessor may re-enter. *Doe v. Birch*, 1 M. & W. 402; *Jones v. Carter*, 15 *id.* 718; *Hayne v. Cummings*, 16 C. B. N. S. 421; *Penoyer v. Brown*, 18 Abb. N. C. 82; *Janes v. Emery Oil Co.*, 1 Penny. (Pa.) 242; and see *Blair v. Peck*, *id.* 247; *post*, §§ 288, 492, and notes.

to the instrument, clearly ascertained, will always control; but conditions and limitations are not to be raised by mere inference or argument. The distinctions on this subject found in the books are extremely artificial; and the construction of any contract will depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in each particular case.¹

§ 274. **Implied Conditions.** — Some conditions are implied in the relation of landlord and tenant without the insertion of any particular words in the lease; as, that a tenant shall always have the quiet enjoyment of the premises, and also, that he shall not create a greater estate than he received from the grantor; for, according to the common-law doctrine, if a tenant for life made a feoffment in fee, it produced a forfeiture of his estate.² But this feudal rule has been abolished in most of the States, and would not now, probably, produce so unreasonable a result anywhere; the grantee, in such case, taking the same estate that the grantor himself had, and no other.³

§ 275. **Precedent and Subsequent.** — Where the condition must be performed before the estate can commence, it is called a condition precedent; but where the effect of it is either to enlarge or defeat an estate already commenced, it is called a condition subsequent. The former avoids the

¹ 4 Kent, Com. 132. A covenant "to surrender (on the lessor's paying for the improvements)" is not conditional. Words parenthetically inserted have never been adjudged a condition; and to make them such, other words fully defining the meaning must be added. *Tallman v. Coffin*, 4 N. Y. 134; *Jackson v. McClallen*, 8 Cow. 295. The apt technical words to create a limitation upon the term of a lease are "while," "as long as," "until," and "during." 2 Bl. Com. 155; *Vanatta v. Brewer*, 32 N. J. Eq. 26.

² Co. Lit. 233, b. It was a rule arising out of the nature of military tenures, that if the tenant denied that he held the feud of his lord, or did any other act inconsistent with his actual relations to the lord, such denial or inconsistency produced a forfeiture of his estate, and this principle applied to leases, as well as to estates in fee. 1 Cruise, Dig. 266, § 40.

³ *Delancy v. Ganong*, 9 N. Y. 9.

estate, by not permitting it to vest until literally performed; while the non-performance of the latter defeats the estate by divesting the party of his title and the interest already vested; because its continuance is made to depend upon the performance of the act, or the happening of the stipulated contingency. Thus if an estate be limited to A., upon his marriage with B., the marriage is a precedent condition, and until that happens no estate vests in A. Or if a man make a lease of land to S. for ten years, provided that if he pays the lessor a certain sum of money on a given day he shall have the land to him and his heirs; this is a condition precedent and must be fulfilled before the estate can take effect. But where a lease is made for years, on condition that the lessee shall pay a sum of money on a certain day or his estate shall be void; this is a condition subsequent, for here the estate vests but its continuance depends upon the breach or performance of the condition.¹ So the landlord's agreement to fit up a store and introduce the street water upon the premises is not a condition precedent to the landlord's right to demand rent when the lessees have actually occupied.²

§ 276. **Inferred from Construction of Instrument and Intent of Parties.** — No precise words are required to make a stipulation a condition precedent or subsequent; and whether it shall be construed as a covenant or a condition does not depend on its place in the instrument, but on the period fixed for performance, as well as on the nature of the transaction, and the intent of the party creating the estate. Thus where after the usual covenants by the lessee to pay rent, &c., it was stipulated that he might determine the lease during the term, on giving six months' notice "from and after" a fixed period, and the performance of his covenants; it was held that such performance was a condition precedent to the exercise of his right to deter-

¹ *Wells v. Smith*, 2 Edw. 78; *Taylor v. Mason*, 9 Wheat. 825; *Shep. Touch.* 17.

² *M'Cullough v. Cox*, 6 Barb. 386; *Emmons v. Scudder*, 115 Mass. 367. But if the lessee refuses to take possession he may resist the payment of a note given for rent in advance. *Hickman v. Rayl*, 55 Ind. 551.

mine the lease;¹ that conditions were to be construed to be either precedent or subsequent, according to the fair intent of the parties, as this could be collected from the instrument; that technical words, if there were any to render such intent doubtful, should give way to the intention; and that, clearly, the parties intended that the tenant should do everything required of him before he could put an end to the lease.² But

¹ *Hotham v. E. Ind. Co.*, 1 T. R. 645; *Powers v. Ware*, 2 Pick. 451; *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Tompkins v. Elliot*, 5 Wend. 496; *Gardner v. Corson*, 15 Mass. 500; *Nicol v. N. Y. & E. R. R.*, 12 N. Y. 121; *Jones v. Barkley*, 2 Doug. 684; *Parmelee v. Oswego R. R.*, 6 N. Y. 74; *Grant v. Johnson*, 5 N. Y. 247; *Hopkins v. Young*, 11 Mass. 302. In *People's Bank v. Mitchell*, 6 N. Y. W. R. 476, the performance of the tenant's covenant to pay taxes was held a condition precedent to the performance of the landlord's covenant to pay the appraised value of improvements.

² *Porter v. Shepherd*, 6 T. R. 665. This case was followed in *Friar v. Grey*, 15 Q. B. 891; 5 Exch. 584, 597; and affirmed finally in 4 H. L. Ca. 565. It carries this doctrine to an extreme, as under it the non-performance in any particular of the lessee's covenants defeats his rights under the lease, and it is maintainable only on the ground that a peculiar privilege was granted to the lessee, and so was properly restrained by the condition. A contrary doctrine, at least as respects the rights of one party based on the ordinary obligations of the other, was held in *Boone v. Eyre*, 2 W. Bl. 1312; *Carpenter v. Creswell*, 4 Bing. 409, and elsewhere. Thus, in *Newson v. Smithies*, 8 H. & N. 840, where the lessor was to pay the lessee for manure on his delivering up the premises, if in the meantime he had observed "all covenants," it was held that the observance of every covenant was not a condition precedent to enforcing the lessor's covenant. But where the obligation of one party is expressly to precede the other's in performance, such performance is a condition precedent; as where the lessee covenants to repair, the premises having first been repaired by lessor: *Neale v. Ratcliff*, 15 Q. B. 916; *Hunt v. Bishop*, 8 Exch. 675; *Hutchinson v. Read*, 4 *id.* 761; or where the lessee accepts the demise on consideration of lessor's repairing: *Tidey v. Mallet*, 16 C. B. N. s. 268; *Coward v. Gregory*, L. R. 2 C. P. 153; *Wright v. Lattin*, 38 Ill. 293; *Hickman v. Rayl*, 55 Ind. 551. But even here, if a concurrent obligation is expressed, though partly to precede the tenant's, it is not a condition; as where the lessor covenanted "first to repair and keep in repair." *Cannock v. Jones*, 3 Exch. 233; *Dean of Bristol v. Jones*, 1 Ellis & E. 484. And see, to the same effect, *Harding v. Kretzinger*, 17 Johns. 293; *Gazley v. Price*, 16 *id.* 267; *Jones v. Gardner*, 10 *id.* 266; *Hopkins v. Young*, 11 Mass. 302; *Gardiner v. Corson*, 15 *id.* 500; *Northrup v. Northrup*, 6 Cow. 296; *Dox v. Day*, 8 Wend. 356; *Lewis v.*

it is only where covenants go to the whole consideration that they form conditions precedent, and where one party covenants to do one thing, the other party doing another, the engagement of the other is not a condition precedent,¹ but the covenants are mutual.² So a grant of land to a town, to use and improve forever, and not to be sold, but rented out, and the rents applied to the support of the minister in the town; or a grant for the purpose of building a school-house for the use of a school, provided it be built on a certain site; is, in either case, on a condition subsequent.³ [But where there was a proviso in the lease that lessee should surrender, and that the lessor might take possession on giving notice and paying compensation, it was held that payment of the compensation was not a condition precedent.⁴ And the lessee's covenant to pay rent is held not to be a condition precedent to the lessor's covenant for quiet enjoyment.⁵ So, on a stipulation in a five years' lease for the lessee to have the privilege of five years more, provided all improvements were done by him, it was held these might be done during the latter five years.⁶]

Weldon, 3 Rand. 71; Conn v. Lewis, 5 Litt. 66; Alexander v. Mann, 6 T. B. Monr. 360; Bank of Columbia v. Hagner, 1 Pet. 464. Upon the principle laid down in Porter v. Shepard, *supra*, it is held that performance of all the covenants in a lease under which a lessee is in possession with privilege of renewal at the end of the term, are conditions precedent to the exercise of the right of renewal. Behrman v. Barto, 54 Cal. 131.

¹ Tileston v. Newell, 13 Mass. 406; Carpenter v. Creswell, 3 Bing. 409; Pepper v. Haight, 20 Barb. 429; Bennett v. Pixley, 7 Johns. 249; Grant v. Johnson, 5 N. Y. 247. It is said that a clause in a lease will not be treated as a condition if it can be construed to be a covenant without doing violence to its terms, and, if the purpose to create a condition or conditional limitation is not expressed in unequivocal language, the clause will be treated as a covenant simply. Hague v. Ahrens, 3 U. S. App. 231.

² Boone v. Eyre, 2 W. Bl. 1312; Carpenter v. Creswell, *supra*; Hickman v. Rayl, *supra*.

³ Hayden v. Stoughton, 5 Pick. 528; Brigham v. Shattuck, 10 Pick. 309.

⁴ Doe v. Kennard, 12 Q. B. 244.

⁵ Parsons v. Miller, 15 Wend. 561; Bartlett v. Greenleaf, 11 Gray, 98.

⁶ Palethorp v. Bergner, 52 Pa. St. 149. An agreement that a tenancy shall expire on the breaking down of a grist mill leased, creates a contingent limitation of the term and upon the happening of the contingency, the tenant is bound to take notice of it, and surrender, with-

§ 277. **Precedent, how construed. — Equitable Relief from. —** Conditions precedent which are to create an estate will always receive a liberal construction for the purpose of carrying into effect the intention of the parties; and if the condition is performed as near the intent as possible, this will usually be sufficient; but conditions which are to defeat an estate will be construed strictly.¹ From the nature of a condition, it is obvious that equity cannot relieve from the forfeiture of an estate which arises upon a condition precedent unperformed. But it is different as to the breach of a condition subsequent which would work a forfeiture or divest an estate; for in such a case equity, acting upon the principle of compensation, will interpose to prevent the forfeiture or divestment, provided that amends can be made in damages.²

§ 278. **Words to create. —** Apt words to create a condition are “upon condition”³ or “provided that;” but the words out notice to quit. *Scott v. Willis*, 122 Ind. 1. A lease contained an agreement that neither the lessee nor his representatives should underlet or assign without the written consent of the lessor; and provided that if default should be made in any of the agreements or covenants of the lessee the lessor might re-enter. It was held, that this was not a mere covenant not to assign, but a power of re-entry for a breach of a covenant, having the force of a condition. *Key v. Trainor*, 150 Ill. 150. It is a condition, not a mere covenant, where the sole consideration for a lease of mineral lands is that tests shall be made within a certain period, and work commenced, if minerals are discovered, within a reasonable time thereafter. And there is no compliance with such condition if the test made is not a substantial but mere colorable one. *Petroleum Co. v. Coal, Coke & Manuf. Co.*, 89 Tenn. 382. Where a tenant stipulates to make certain improvements within a designated time, and in case of failure to do so agrees to forfeit his lease, the stipulation is a condition upon breach of which the landlord is entitled to re-enter. *Winn v. State*, 55 Ark. 360.

¹ *Ld. Ray.* 335; *Co. Lit.* 220, a. Hence a reference in a lease to a prior lease and its condition will incorporate such condition only as to such covenants as it applied to in the former lease. *Crawley v. Rice*, L. R. 10 Q. B. 302. A condition against using demised premises for purposes other than a post-office is not broken by the issue of dog licenses on the premises. *Wadham v. Postm. Gen.*, L. R. 6 Q. B. 644.

² *Walker v. Wheeler*, 2 Conn. 299; *Wells v. Smith*, 2 Edw. 78; *Scott v. Tyler*, 2 Bro. C. C. 431; *Duffield v. Elwes*, 1 Sim. & S. 239.

³ *Crawley v. Mullins*, 48 Mo. 517.

used may import both a condition and a covenant. As, if in a lease for years the words were, "provided always, and it is covenanted and agreed between the parties that the lessee shall not alien," there is both a condition by force of the proviso, and a covenant by virtue of the other words.¹ So if a power of re-entry for the breach of a covenant is added to such covenant, it has the force of a condition² [but mere words of contract will not make a condition if there is no clause of re-entry³]. If it is doubtful whether the clause in question is to be construed as a condition or a covenant, the court will incline to the latter construction as being more favorable for a tenant. But where a man covenanted and agreed to let his land to another for five years, provided always that the lessee should pay him annually, during the term, a certain sum of money, it was held to be a covenant for the payment of rent, as well as a condition, the non-performance of which might defeat the estate.⁴

§ 279. **Effect of Certain Words to create.** — The word "proviso" in a lease implies a condition, unless there are subsequent words which change it into a covenant, or a penalty is annexed for non-performance. But where the proviso is that the lessee shall perform or not perform a thing, and no penalty is annexed, it is a condition; upon annexing a penalty, it becomes a covenant.⁵ The words "yielding and rendering" do not amount to a condition, but merely import a covenant to pay rent, unless the landlord would otherwise be without remedy in case the rent should not be paid.⁶ Mere words in restraint of a grant do not make a condition; as, if the lessor grants "firewood, provided he do not take it of the great trees," it may be waste, but no cause of re-entry, if he

¹ Co. Lit. 208, b; Doe v. Watt, 8 B. & C. 808.

² Jackson v. McClallen, 8 Cow. 295. And such a clause will apply to negative covenants. Wadham v. Postm. Gen., L. R. 6 Q. B. 644.

³ Shaw v. Coffin, 14 C. B. N. S. 372; Crawley v. Rice, L. R. 10 Q. B. 302.

⁴ Livingston v. Stickles, 8 Paige, 398.

⁵ Jackson v. Allen, 8 Cow. 221; Gray v. Blanchard, 8 Pick. 284; Simpson v. Titterell, Cro. El. 242.

⁶ Delancy v. Ganong, 9 N. Y. 9.

does take of the great trees. Nor will insensible words make a condition; as a lease of forty years to a woman upon condition "if she lives so long and keeps herself such," without further explanation as to how she is to keep herself; for the intent is uncertain.¹ [A covenant to surrender, &c. "(on the lessor's paying for the improvements)," is not conditional. To make words thus parenthetically inserted a condition, other words, defining the meaning and leaving no doubt of the intention of the parties, must be added.² A stipulation at the end of a lease, not to make any alterations in the buildings without the consent of the lessor, is not a condition for the breach of which the lease will be forfeited.³]

§ 280. **Created by Separate Instrument.** — **Time within which to perform.** — A lessor having the unlimited disposal of his property may annex whatever conditions he pleases to his grant, provided they are not illegal or inconsistent⁴ [or contrary to reason or public policy⁵]. Conditions can be annexed to an estate only at the time of its creation, but may be by a separate deed from that which creates the estate; provided this is sealed and delivered at the time of executing the principal deed.⁶ If written on the back of a lease, before or at the time the lease is executed, the condition is valid.⁷ Where the prompt performance of a condition is necessary to give the grantee the whole benefit designed to be secured to him, or where immediate enjoyment constituted the motive for the contract, the grantee forfeits the estate unless he performs the condition in a reasonable time.⁸ But if no time is limited for the performance of the condition, the grantee has, in general, his whole lifetime for performance.⁹

¹ Com. Dig. Condition (A.), 6; 3 Leon. 16; *Hardy v. Seyer*, Cro. El. 414.

² *Tallman v. Coffin*, 4 N. Y. 134; *Jackson v. McClallan*, 8 Cow. 295.

³ *Jackson v. Harrison*, 17 Johns. 66.

⁴ *Lord Cromwell's Case*, 2 Co. 69; *Roe v. Galliers*, 2 T. R. 133.

⁵ *Brugman v. Noyes*, 6 Wis. 1.

⁶ *Griffin v. Stanhope*, Cro. Jac. 456; *Goodright v. Mark*, 4 M. & S. 30.

⁷ *Ibid.*; *Fowell v. Forrest*, 2 Saund. 48; *Shep. Touch.* 126.

⁸ *Hamilton v. Elliott*, 5 S. & R. 384.

⁹ Per Marshall, C. J., *Finlay v. King's Lessee*, 3 Pet. 376.

And if a precedent act is to be performed at a certain time or place, and a strict performance is prevented by the absence of the party who has the right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.¹

§ 281. **Impossible Conditions void.** — If a condition subsequent is impossible at the time of its creation, or becomes so afterwards by the act of God, or of the law, or of the grantor; or if the condition is contrary to law or repugnant to the nature of the estate granted; it is void, and the estate is vested absolutely in the grantee.² If a condition is in the disjunctive, giving the obligor liberty to do one thing or another at his election, and one part becomes impossible by the default of the other party, he is not bound to perform the other part. As if it be to make assurance to A. as he shall devise; or, upon default, to pay five hundred pounds; if A. does not tender an assurance, the other party need not pay the money. The same principle applies where one part becomes impossible by the act of God. But if one alternative was impossible at the time of making it, the obligor is still bound to perform the other. And where a lease was made to A., B., and C., with a proviso that if C. should demand any profits of the land, or enter into the same during the lifetime of A. or B. (who were his father and mother), that then the estate limited to C. should cease, and be utterly void, it was resolved that this was a void condition, forasmuch as it was repugnant to the estate limited.³

§ 282. **Breach of. — When Equity will enforce Forfeiture.** — A mere personal disability will not excuse the non-performance of a condition; and therefore, where an estate is

¹ *Williams v. Bank*, 2 Pet. 102.

² *People v. Manning*, 8 Cow. 297; *McLachlan v. McLachlan*, 9 Paige, 534; *Holland v. Bouldin*, 4 T. B. Monr. 147; *Co. Lit.* 206, a; *Doe v. Carter*, 8 T. R. 57; *Scovel v. Cabell*, Cro. El. 107; *Merrill v. Emery*, 10 Pick. 507.

³ *Com. Dig. Condition (K.)*, 2; *Taylor v. Bullen*, 6 Cow. 627; *Moore v. Savil*, 2 Leon. 132.

granted to an infant or *feme covert* on condition, they are bound to a strict performance; and, if the condition be broken during the minority of the infant, the land is lost forever.¹ If it be a condition precedent, which is impossible, the grant is absolutely void, and the estate can never arise.² But as to a condition subsequent, which is never favored in law, its validity will depend upon its being such as the law will allow to divest the estate. And it is to be observed that equity will never lend its aid for the purpose of divesting an estate for the breach of a condition subsequent; because this tends to destroy estates, which it is the policy of the law to uphold; the relief which equity affords being confined to cases where the forfeiture has been the result of inevitable accident, and the injury produced capable of pecuniary compensation.³

§ 283. **Repugnant or against Public Policy, void.** — As to estates which are determinable upon certain conditions, it is to be observed that a condition must not be repugnant to the nature of the estate or to the language of the grant;⁴ nor must it be against the policy of the law, as an unwarrantable restraint upon trade, or marriage, or the power of alienation. Neither must it be a stipulation for that which is immoral. Conditions of this class are either to do something that is *malum in se* or *malum prohibitum*, to omit the doing something that is a duty, or to encourage such crimes and omissions. Such conditions the law will always, and without regard to circumstances, defeat; being concerned to remove temptations and inducements to crime.⁵

§ 284. **Against Alienation, when void.** — It is a general rule that a condition upon a feoffment in fee not to alien at all is void for repugnancy; for a man cannot dispose of his whole interest in a thing, and yet retain a control over it.

¹ *Williams v. Fry*, 2 Lev. 21.

² *Taylor v. Mason*, 9 Wheat. 325; *Arnold v. United States*, 9 Cranch. 104; *Weatherall v. Geering*, 12 Ves. 504; *Mookley v. Riggs*, 19 Johns. 69.

³ *Pullen v. Ready*, 2 Atk. 587.

⁴ *Depeyster v. Michael*, 6 N. Y. 467.

⁵ *Mitchell v. Reynolds*, 1 P. Wms. 189.

But at common law, a grantee may be restrained from assigning for a particular time, or to a particular person; and so a condition in a lease that the grant shall become void, if the grantee becomes a bankrupt, has been held valid.¹ Yet Chancellor Kent questions whether a restraint of alienation to a particular person named would be a valid condition. It is certain that the courts look with jealousy upon restraints on the free exercise of that right of alienation which belongs to estates in fee. For this reason, a devise of lands to the testator's children, "in case they continued to inhabit the town of S., otherwise not," was considered in New York to be unreasonable and repugnant to the nature of the estate; and therefore void.² So, where a lease in perpetuity contained a condition and covenant, that, upon every proposed sale of the premises, the lessee or his assigns should obtain the consent in writing of the lessor and offer him the pre-emptive right to purchase, and that, if, such offer refused, the premises were sold to another, one tenth of the purchase-money should be paid to the lessor; and the lessee made a contract to sell, and agreed to pay the tenth of the sale to the owner of the rent and reversion, the purchaser actually taking possession under his contract to purchase;—it was held that the lessor had no remedy in equity to enforce the agreement; that such a covenant and condition was a restraint in the nature of a fine upon alienation; and that equity would not interfere to enforce the performance of such covenants and conditions where the landlord, by the terms of his lease, had not secured to himself a legal right, as distinguished from an equitable claim, to enforce a bargain upon which the law gave him no right of action.³

§ 285. *Cases in which held valid.* — In a previous case in the same State, on a similar covenant in a lease, to a man, his heirs and assigns forever, paying a certain rent, and that in case the lessee should propose to sell, he would first offer the property to the lessor, and if the lessor did not purchase, the

¹ *Doe v. Carter*, 8 T. R. 57; Co. Lit. 223, a; *Mary Portington's Case*, 10 Co. 38, b.

² *Newkerk v. Newkerk*, 2 Caines, 345.

³ *Livingston v. Stickles*, 8 Paige, 398.

lessee would pay him one tenth of the purchase-money, and if the lessee did not keep and perform all the conditions, the estate should cease, and the lease become void; it was held that the condition was valid, and that the nature of the estate created by such lease was a fee-simple conditional, or a fee-simple subject to be defeated upon a condition subsequent, by the failure or non-performance of which an estate already vested might be defeated. It was said that if the condition had been general, *not to alien*, it would necessarily have been repugnant, and therefore void; but that being a grant coupled with the condition that if the tenth of the proceeds of sale was not paid to the lessor the estate should be defeated, the lease would be forfeited upon a breach of such condition, and the lessor might re-enter.¹ But it has since been decided that the reservation in a lease in fee, of a pre-emptive right of purchase by the grantor and his heirs in case of a sale by the grantee, his heirs or assigns, and the reservation by the grantor of a right to a portion of the sale-money on such sale by the grantee, with a condition of re-entry if these terms were not complied with, are void, as repugnant to the estate granted, and as placing an illegal restraint upon the power of alienation.²

§ 286. **Against doing Particular Acts.** — If the condition is, that the lessee will not do a particular act without leave from

¹ Jackson v. Schutz, 18 Johns. 174.

² Depeyster v. Michael, 6 N. Y. 467. In this case the lessor, in addition to an annual rent, reserved a pre-emptive right on paying three quarters of the price demanded, otherwise, one fourth part of all moneys which should arise from the selling, renting, or disposing of the lands by the lessee, his heirs or assigns, when and as often as the same should be sold, rented, or disposed of. It seems from this case that, during the New York colonial government, the English statute of *quia emptores* was not regarded as in force. But though this decision has not been qualified in the particular point decided, it has yet since been held that the statute of *quia emptores* was in force in New York before the statutes of 1779 and 1787, and also that the reservation of rent creates sufficient privity, notwithstanding the statute, to enable the lessor's assigns to bring covenant or ejectment against the lessee and his assigns for the rent reserved. Van Rensselaer v. Hays, 19 N. Y. 68; Same v. Ball, *id.* 100; and see § 261, *ante*, and notes.

his lessor, when such leave is once granted, the condition is gone forever; for a condition must be construed strictly, and by one license it is satisfied.¹ But the license must be such as is required by the lease; and, therefore, where the lease required the license to be in writing, a parol license was held to be insufficient to satisfy the condition or otherwise subsequent assignment;² and if a license has been used as a snare, or under circumstances which amount to fraud, equity will grant relief.³

§ 287. **Forfeiture for Breach of, how Waived.** — The forfeiture of a lease by breach of any other condition may be waived, in the same manner as a forfeiture for non-payment of rent, or a notice to quit; for if the landlord subsequently does any act, with knowledge of the breach, which can be considered as an acknowledgment of a tenancy, still subsisting, he will be held to have waived the forfeiture; and if the condition imposes a single obligation, and must be taken wholly if at all, the condition itself is discharged by such waiver, as much as by a license.⁴

¹ *Dumpor's Case*, 4 Co. 119, b; *Bleecker v. Smith*, 13 Wend. 530; *Dakin v. Williams*, 17 Wend. 447; s. c. 22 *id.* 201. "The profession have always wondered at *Dumpor's Case*," said Sir J. Mansfield, in *Doe v. Bliss*, 4 Taunt. 735; "but it has been law so many centuries, that we cannot now reverse it." So, *Ld. Eldon*, in *Bummel v. Macpherson*, 14 Ves. 173; and *Dakin v. Williams*, *supra*. Now, in England, by Statute 22-23 Vict. c. 35; 23-24 Vict. c. 38; a first license will only discharge the condition by express words to that effect. But *Dumpor's Case* was followed in *Lynde v. Hough*, 27 Barb. 415, 422; *Siefke v. Kock*, 31 How. Pr. 383; *McKildoe v. Darracott*, 13 Gratt. 278; *Dougherty v. Matthews*, 35 Mo. 520; *Pennock v. Lyons*, 118 Mass. 92; and see *Gannett v. Albree*, 103 *id.* 372; and *Chipman v. Emeric*, 5 Cal. 49. The doctrine, of course, applies only to negative covenants, for a license is a permission to do a prohibited act, not to omit an affirmative duty. But it makes no difference whether the condition relates to a single or continuous duty. A license for one breach in the manner contemplated by the lease will discharge the whole condition.

² *Roe v. Harrison*, 2 T. R. 425; *Seers v. Hind*, 1 Ves. 294.

³ *Richardson v. Evans*, 3 Madd. 218; *Macher v. Found. Hosp.*, 1 Ves. & B. 191; *Roe v. Harrison*, 2 T. R. 425.

⁴ 1 *Smith's Lead. Cas.* 20, a; *Lloyd v. Crispe*, 5 Taunt. 249; *McGlynn v. Moore*, 25 Cal. 384; *Conger v. Duryee*, 90 N. Y. 594. The right to

§ 288. **Subsequent, Breach of, how waived.** — In general where an estate is defeasible on the non-performance of a condition subsequent, it is not absolutely defeated upon the happening of the contingency on which it is defeasible; for the estate will continue afterwards, unless the grantor or his heirs take advantage of the breach of condition by an actual entry, which is generally necessary to revest an estate of freehold,¹ if the grantor is not already in possession.² A different rule, however, formerly prevailed with regard to a term of years, and it was held that on a breach of condition the lease was absolutely determined and could not be set up again by any act, even on the part of the landlord. But this doctrine is no longer recognized.³

§ 289. **Substantial Performance of, Sufficient.** — The substantial performance of a condition is generally sufficient; and its non-performance may be excused when occasioned by the act of the law, or of the other party; and, generally, if a condition becomes impossible by the act of God, the obligation is discharged. As, where the obligee in a condition subsequent died; or a man covenanted to build a house before a certain day, and afterwards the plague came there before the day and continued there until after the day, the condition was in each case held to be dispensed with.⁴ So where the law forbids the act conditioned to be performed, performance is excused.⁵ The same result follows, where the party accepts another thing in satisfaction,⁶ or is himself in default; as where the condition is the payment of a sum of money, and

insist upon the forfeiture of a lease for breach of condition subsequent was held to be waived by the lessor recognizing the lessee's right to assign the lease. *Deaton v. Taylor*, 90 Va. 219. As to the termination of tenancies by forfeiture, see §§ 488–501, *post*.

¹ *Canal Co. v. Railroad Co.*, 4 Gill & J. 121; *Willard v. Henry*, 2 N. H. 120; *Chalker v. Chalker*, 1 Conn. 79.

² *Lincoln Bank v. Drummond*, 5 Mass. 321; *Rollins v. Riley*, 44 N. H. 9.

³ See §§ 412, 492, *post*, and notes.

⁴ *Merrill v. Emery*, 10 Pick. 507; 1 Roll. Abr. 450.

⁵ *Holland v. Bouldin*, 4 T. B. Monr. 150.

⁶ *Brown v. Vandergrift*, 80 Pa. St. 142.

the payee is out of the commonwealth;¹ or the obligation is to build or repair a house, and the obligee hinders or forbids the performance. But where the lessee covenanted to drain the water upon the land before a certain day, and the lessor entered upon the premises before that day and continued there until the day was past, this was held not to be an excuse, unless the lessor had interfered with the lessee's operations.² [Where in a mining-lease it was stipulated that the ore was to be worked in a "good and husbandlike" manner, it is held no excuse if it cannot be worked at a profit; and a delay to take any ore out for sixteen months will work a forfeiture.³ In a similar lease, a clause of re-entry, if mining should cease for twenty days, was held not to be abrogated by a clause providing that a certain named sum should be paid for every day elapsed before mining began.⁴

§ 290. **Clause of Re-entry in Lease.**—It is the practice to insert in a lease a clause of re-entry for a breach of its covenants or conditions. This practice is said to have grown out of an ancient process for the recovery of rent by writ of *cessavit*, which in fact amounted to a distress of the whole of the tenant's land by seizing and holding it until he paid the arrearage of rent. For, by feudal law, after the lord had granted out his lands, he still had the right of seignior, as well as the right to all the other services reserved upon the grant; and in case of a failure in any of them, he might enter upon and take possession of the feud. This proceeding, however, was taken away by the Statute of 52 Henry III., which prohibited a distress of the freehold, except by the king's writ, and left the tenant's chattels, as the only subject for the lord's distress. After which, and as a convenient substitute therefor, the practice was introduced, on granting a lease, of inserting a power of re-entry for the non-payment of rent; which

¹ *Williams v. Bank*, U. S., 2 Pet. 102; *U. S. v. Arredondo*, 6 *id.* 745; *Bradstreet v. Clark*, 21 Pick. 389.

² *Carrel v. Read*, Cro. El. 374; *Jackson v. Crafts*, 18 Johns. 110.

³ *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80.

⁴ *Brown v. Vandergrift*, 80 Pa. St. 142. See *Munroe v. Armstrong*, 96 Pa. St. 307. See § 17 *a*, *ante*.

practice gradually extended itself to other covenants and causes of forfeiture besides the non-payment of rent. [The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed; and all the conditions or stipulations annexed thereto must be strictly followed.¹ In other words, the right is not a reversionary or other estate in the land, but a mere right of action, and, if enforced, the grantor of the estate is in by the forfeiture of the condition, and not by a reverter. At common law, this right of action could not be granted over, and it is only by force of statute that the assignee of the lessor can now re-enter for condition broken. But the statute did not convert this right into a reversionary estate.²]

§ 291. **Re-entry Clause essential to support Action of Covenant.**—The clause of re-entry enables the lessor, his heirs or assigns, in case of a breach of condition or covenant, to re-enter upon the demised premises, and eject the tenant, leaving both parties in the same situation as if the lease had never been granted.³ Without such a clause, the grantor and his heirs may still enter, and take advantage of a breach of condition, or other common-law forfeiture, by ejectment;⁴ but in case of a breach of covenant, in the absence of a proviso for re-entry, the lessor would possess no such power; for the mere breach of a covenant enables him to sue for damages only.⁵ [Thus a

¹ *Smith v. Blaisdell*, 17 Vt. 199.

² See Hargrave's note to Co. Lit. 142, a.

³ *Johns v. Whittey*, 3 Wils. 127; *Doe v. Phillips*, 2 Bing. 13.

⁴ *Wigg v. Wigg*, 1 Atk. 382; *Doe v. Watt*, 1 Mann. & R. 694.

⁵ *Pells v. Brown*, Cro. Jac. 590; *Delancy v. Ganong*, *ante*; *Page v. Hayward*, 11 Mod. 61, per Holt, C. J.; *Brown v. Kite*, 2 Overt. 233; *Bockover v. Post*, 1 Dutch. 285; *Fox v. Brissac*, 15 Cal. 223; *Johnson v. Gurley*, 52 Tex. 222. A right of re-entry may be effectually given upon breach of covenants, including a covenant to pay rent, as well as in terms for non-payment of rent; and though a general clause of re-entry can extend only to cases not otherwise specially provided for, yet such a general clause is compatible with a prior clause giving a right of re-entry also after a certain period of default in the rent. *Van Rensselaer v. Jewett*, 2 N. Y. 141. A proviso for re-entry is to receive a reasonable construction; and is not to be construed with the strictness of conditions at law.

stipulation in a lease that the lessee shall surrender the leased premises to the lessor whenever the latter desires to proceed with contemplated improvements thereon, does not give the lessor the right to terminate the lease by re-entry, but is merely a covenant for the breach of which the lessor may recover damages.^{1]} The remedy at law affords but an indifferent security to the landlord, from the difficulty of ascertaining the actual damage done by a breach of the covenant, or the inability of a tenant to pay the damages after these shall have been recovered. The principle applies also to the case of a tenant, holding under a mere agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.²

§ 292. **Re-entry to be made during the Term.** — But a proviso for re-entry operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease of “ninety-nine years if A. and B. should so long live” was granted, with a proviso for re-entry in case the lessee should underlet the premises for the purposes of tillage, and an under-tenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate; it was held, in an action of trespass by the lessor against the under-tenant, for entering upon the land after the determination of the estate for the purpose of carrying away the emblements, that the plaintiff, never having been in possession by right of re-entry for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.³

§ 293. **Who may reserve Right of Re-entry.** — At common law, a power of re-entry, like a condition, can be reserved *Doe v. Elsam*, 1 Mood. & M. 189. A lessee was to incur a forfeiture if he did not do certain repairs to the satisfaction of the surveyor of the lessor. He did the repairs, but the lessor’s surveyor was not satisfied; held, that if the jury thought the surveyor ought to have been satisfied, there would be no forfeiture. *Doe v. Jones*, 2 C. & K. 743.

¹ *Bergland v. Frawley*, 72 Wis. 559.

² *Doe v. Breach*, 6 Esp. 106; *Doe v. Watt*, 8 B. & C. 308; *Doe v. Kneller*, 4 C. & P. 3.

³ *Johns v. Whittey*, 3 Wils. 127.

only to the lessor and his heirs,¹ and not to a stranger even by express words. As, where a lease was made by a trustee, reserving a right of re-entry, upon a breach of covenant, to the *cestui que trust*; forasmuch as the legal estate was in the trustee the reservation was held to be void.² So, where a person devised leasehold property [in trust for] his wife to receive the rents during her lifetime, and the trustee and the widow afterward granted a lease of the premises; rent to be paid to the widow and the lessors to have a power to re-enter for the non-payment of rent; it was held that, being a stranger to the legal estate, the power of re-entry could not be reserved to the widow, and that the lease operated as a lease by the trustee, with a simple confirmation by her.³ For a similar reason, this power is not available by the executor of one who has granted land in fee, subject to an annual rent; for, as executor, he could not be vested with the estate. It would be otherwise, however, if the testator held an estate for years in the premises, and had leased them for part of the term; since the residuary estate in that case would belong to the executor.⁴ And a power to a particular person to enter will not extend to his executor, unless so mentioned.⁵ But a residuary devisee may take advantage of such a condition, annexed to a specific devise, if the devisor do not otherwise limit over the contingent interest in the estate thus specifically devised.⁶ And so may an assignee of the reversion, as we

¹ See § 295, *post*.

² *King's Chapel v. Pelham*, 9 Mass. 501; *Doe v. Lawrence*, 4 Taunt. 23; *Jackson v. Topping*, 1 Wend. 388.

³ *Doe v. Goldsmith*, 2 C. & J. 674; and see *Doe v. Adams*, *id.* 232. A proviso for re-entry, if the lessee shall make default in the performance of any other covenants, which on his part are or ought to be performed or kept, applies to and forbids the breach of a negative as well as of a positive covenant. *Croft v. Lumley*, 6 H. L. Ca. 672.

⁴ *Van Rensselaer v. Hayes*, 5 Den. 477.

⁵ *Hassel v. Gowthwaite*, Willes, 500. A right of re-entry for the non-payment of rent may be reserved upon a conveyance in fee, and is assignable with the rent. *Van Rensselaer v. Ball*, 19 N. Y. 100.

⁶ *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10 *id.* 306; *Clapp v. Stoughton*, *id.* 463; *Austin v. Cambridgeport*, 21 Pick. 215. In New York, the right of a devisee to take advantage of a condition reserved in a grant in fee by his devisor seems established. See cases cited,

shall see, by force of the Statute of Henry VIII.; yet, generally, when no words of limitation are used, the law will reserve the benefit of the condition to the heirs of the lessor.¹

§ 294. **Rights of Lessor's Reversioner.** — To enable a reversioner to avail himself of a forfeiture, upon a condition broken, it was necessary, according to the English cases, that he should have the same estate in the lands at the time of the breach that existed when the condition was created; for an extinguishment of the estate in reversion, in respect of which the condition was made, will extinguish the condition also.² As, where a lease was made for a hundred years, and the lessee executed an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term, it was held that the grantee should not have either the rent or the power of re-entry; for the reversion of the term to which they were incident was extinguished in the reversion in fee.³ It is not, however, necessary that the party claiming should have an actual reversion, remaining in the land after the grant; for if a lessee for years assign his whole term to another upon condition, he may still re-enter for breach of the condition, though he may have parted with his whole term.⁴ Yet a third person cannot enter, unless he comes in under the lessor; therefore, if a lessee for twenty

§ 295, *post*, note; and the courts do not limit the doctrine to devisees, but apply it to all assignees. In *McKissick v. Pickle*, 16 Pa. St. 140, the court seem to consider the old law restricting the reservation of conditions to, and enforcement of them by, the grantor's heirs alone, to be obsolete, so that an assignee may take advantage of any condition so reserved. Neither the executor nor a devisee of one who has granted land in fee subject to rent, can maintain ejectment for rent in arrear which became payable in the lifetime of the testator, but only for such as accrued since the will took effect. *Van Rensselaer v. Hayes*, 5 Den. 477.

¹ Co. Lit. 214, a; 3 Atk. 134.

² *Dumpor's Case*, 4 Co. 119, b.

³ *Theirr v. Barton*, Moore, 94; *Webb v. Russell*, 3 T. R. 393; Co. Lit. 215, b.

⁴ *Doe v. Bateman*, 2 B. & A. 168; *Colville v. Hall*, 14 Ir. C. L. 652; and see § 295, *post*, and note.

years make a lease for ten on condition, and then surrender to him in reversion, the reversioner, being in of a paramount estate, cannot take advantage of the condition.¹

§ 295. *Of Lessor's Assignee or Grantee.*—At common law, an assignee or grantee of a reversion, although he might have an action for rent reserved, could not enter for a condition broken; for, to prevent maintenance, an assignment of a mere right of entry was not allowed. The Statute 32 Henry VIII. c. 34, first provided that assignees or grantees of a reversion should be entitled to all such advantages as the lessors or grantors themselves had, by entry for non-payment of rent, or other forfeiture.² This statute has been generally re-enacted in the United States. It has been held in New York, in construction of the statute cited below, that the grantee of a rent reserved in fee was entitled to all the remedies which his grantor had before he parted with the reversion; that a right of re-entry for the non-payment of rent may be reserved upon such a conveyance; and that such a right is not confined to the grantor and his heirs, but is assignable, with the rent, by force of the statute.³

¹ *Chaworth v. Phillips*, Moore, 876.

² But the condition must relate to the land devised. *Co. Lit.* 215, b; *Comyn L. & T.* 286; *Stockb. Iron Co. v. Cone Iron Works*, 102 Mass. 80, 84. Hence a condition of re-entry for any breach of the game laws will not pass. *Stevens v. Copp*, L. R. 4 Exch. 20. The provision applies as against lessees holding over. *Smith v. Kaiser*, 17 Neb. 184.

³ *Van Rensselaer v. Hayes*, 19 N. Y. 68; *Van Rensselaer v. Ball*, *id.* 100. These cases held that the assignee of a lessor in fee might have covenant and ejectment at common law, although having no reversion; since the privity which this would confer was replaced by the privity flowing from the rent as an incorporeal hereditament. The St. 1805, c. 98, was repealed by St. 1860, c. 396; but the same right of action was held to exist under the St. 1846, c. 274: *Van Rensselaer v. Slingerland*, 26 N. Y. 580; and at common law: *Same v. Dennison*, 35 *id.* 393, where the operation of the St. 1787 was declared to be restricted to covenants in law; and so see *Tyler v. Heidorn*, 46 Barb. 439, b. The actions in all these cases were by devisees, to whom such conditions were held to pass by *Hayden v. Stoughton*, 5 Pick. 528; see § 293, *ante*, n.; but the courts do not distinguish between these and any class of assignees, nor, on principle, can distinction be made between them; or between the grantee of a rent charge, and the grantee of a lessor in fee reserving rent. See *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Hosford v. Ballard*, *id.* 147.

§ 296. **Of Assignee of Part of the Reversion.** — But an assignee of part of the reversion was not within the Statute of Henry VIII.; as, if a lease be made of three acres of land, with a condition for re-entry, the assignee of the reversion of two acres cannot enter for a breach of the condition; for the condition, being entire, cannot be apportioned by the act of the parties, but will be destroyed.¹ On the other hand, where the landlord re-enters, he is in of his old estate in the same plight in which it was when he parted with it, and therefore all charges and incumbrances or alienations made by the tenant since the condition was created are avoided at the same time.² Yet, although the assignee of the reversion of part of the land cannot enter for a condition broken, he may maintain an action of covenant under the statute.³

§ 297. **Demand for Rent to precede Re-entry.** — Where a landlord has a right of re-entry for non-payment of rent, a demand of the rent, either upon or after the last day which the lessee has to pay, is essential to complete the forfeiture, and enable him to maintain an action; for it is not until after demand and non-payment that this condition is broken.⁴ But there may, by the special agreement of parties, be a re-entry for default in the payment of rent, without a demand of it.⁵

¹ Co. Lit. 215, a; Dumpor's Case, 4 Co. 119, b; Knight's Case, 5 *id.* 55, b; Lee v. Arnold, 4 Leon. 27.

² Shep. Touch. 121. In *Eyton v. Jones*, 21 L. T. N. S. 781, there was a clause of forfeiture for assigning, except as to three acres. The tenant having aliened the three acres assigned by license the remainder (after the Statute 22-23, 23-24, Vict.), and his assignee assigned the whole without license. It was held that the whole was re-vested in the lessor by his entry.

³ *Twynam v. Pickard*, 2 B. & A. 105.

⁴ *Doe v. Wandlass*, 7 T. R. 117. See *Nowell v. Wentworth*, 58 N. H. 319, § 493, *post*, as to the strict requisites of the demand when the landlord proceeds to enforce a forfeiture under the common law. See *Johnston v. Hargrove*, 81 Va. 118; *Parks v. Hays*, 92 Tenn. 161; *Haynes v. Union Inv. Co.*, 35 Neb. 766; *Sauer v. Meyer*, 87 Cal. 34. Where no place for payment is mentioned in a lease the landlord must make demand on the land before he will be entitled to a forfeiture; although the habit has been for the tenant to seek the landlord and make payment. *Rea v. Eagle Transfer Co.*, 201 Pa. 373.

⁵ *Dormer's Case*, 5 Co. 39; *Pendill v. Union Mining Co.*, 64 Mich.

In such case, the mere failure to pay, with or without demand, constitutes the breach which works a forfeiture, and a subsequent entry at any time is good.¹ So, if the tenant disclaims holding under the landlord, or refuses to pay rent on that ground, the lessor is entitled to re-enter without any previous demand of rent.² An actual demand is, in general, necessary to complete the breach, whether the proviso gives the right of re-entry in case the rent be behind for a certain period of time after the day whereon it falls due, or the lease is declared to be absolutely void in case of its non-payment.³ Accordingly, where the condition was that, if the rent were suffered to remain due and unpaid, the indenture and the estate thereby created should be void; it was held that the grantor was not entitled to recover as for a condition broken, without showing a formal demand of the precise sum due, at a convenient time before sundown of the day on which the rent became payable by the reservation.⁴

§ 298. **Where Re-entry not necessary. — Demand always necessary.** — Wherever the action of ejectment is in force, no actual entry by the landlord is necessary to enable him to take advantage of a condition broken, because the constructive entry implied and confessed in the action is sufficient for the purpose, even where the estate to be avoided is one of freehold.⁵ And where the grantor is already in possession, while no entry by him is required,⁶ he must manifest his intention to

172; *Fifty Associates v. Howland*, 5 Cush. 214, where stipulation that lessor might enter without further demand was held to mean without any demand.

¹ *Sweeny v. Garrett*, 2 Disney, 601; *Goodright v. Cator*, 2 Dougl. 478; *Doe v. Masters*, 2 B. & C. 490.

² *Jackson v. Collins*, 11 Johns. 1; *Salem Presb. Cong. v. Williams*, 9 Wend. 147.

³ Co. Lit. 202, a; *Clun's Case*, 10 Co. 129; *Doe v. Wandlass*, *supra*; *Bowyer v. Seymour*, 13 W. Va. 12.

⁴ *Jackson v. Kipp*, 3 Wend. 230.

⁵ *Doe v. Masters*, *supra*; *Little v. Heaton*, 2 Ld. Ray. 750; *Bear v. Whistler*, 7 Watts, 149; *Jackson v. Crysler*, 1 Johns. Cas. 125; *Doe v. Alexander*, 2 M. & S. 525; *Garrett v. Scouten*, 3 Den. 334. In Michigan, absolute notice to quit and demand of possession are held to constitute a sufficient re-entry. *Alexander v. Hodges*, 41 Mich. 691.

⁶ § 288, *ante*.

avail himself of the forfeiture, by some distinct act.¹ But the necessity of proving a strict common-law demand, both as to time and place, still remains wherever a forfeiture for the non-payment of rent is to be established, unless when demand is dispensed with by agreement of the parties or by statute.² Thus where, under a proviso for re-entry, in case of the non-payment of rent for twenty-one days after it was due, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day, at one o'clock; it was held that only one quarter's rent should have been demanded, and that the demand must have been made at sunset if the lessor intended to insist upon the forfeiture.³

§ 299. **Re-entry under the English Statute.**—So, under the English Statute 4 Geo. II. c. 28, where there is a proviso for re-entry, if no sufficient distress is found upon the premises, at the expiration of fourteen days from the rent-day, the landlord is *prima facie* entitled to recover after proof of there being no distress on the premises some day after the fourteen, though that day should be subsequent to the demise in the ejectment.⁴ The direction of the statute must be strictly pursued, and it is necessary that every part of the premises be searched, in order to ascertain that no sufficient distress can be found thereon.⁵ But a lessor can in no case bring an eject-

¹ *Hubbard v. Hubbard*, 97 Mass. 188; *Stockbridge Iron Co. v. Cone Iron Works*, 102 *id.* 80. In *Allen v. Brown*, 5 Lans. 280, it is held that a landlord cannot accept a surrender of a lease for life where waste has been committed, so as to divest lessee's mortgage. The court lays down the general rule that a lessor for life cannot divest by mere entry, but must bring ejectment; though otherwise in a lease for years. *Ebsworth v. Jackson*, 20 Johns. 180, is relied upon, but there it was held only that a general entry would not be presumed to be for forfeiture. In the principal case the condition was against waste, and the fact of waste should perhaps be first judicially settled; but this is aside from the point discussed. This doctrine has no support in English law, and is not borne out by any cited case.

² *McCormick v. Connell*, 6 S. & R. 151; *Van Rensselaer v. Jewett*, 2 N. Y. 147.

³ *Doe v. Paul*, 3 C. & P. 613.

⁴ *Doe v. Fuchau*, 15 East, 286.

⁵ *Rees v. King, Forrest*, 19.

ment upon the clause of re-entry after distraining for rent in arrear; such a proceeding being considered a waiver of the forfeiture.¹

§ 300. **Demand dispensed with by Statute.** — The formalities of a common-law demand to enforce a condition for the payment of rent are dispensed with by statute in many of the States, following the provisions of the Statute 4 Geo. II. c. 28, and an action of ejectment is substituted; the right thereto depending on the question whether a sufficient distress is or not found on the premises.² In place of the formal action of ejectment, which the English and some of the older statutes gave, a summary remedy is provided in many States, whereby recovery of the premises may be had.³

§ 301. **In New York.** — The New York statute does not extend to cases where the lease contains no clause of re-entry,⁴ nor where there is a sufficient distress upon the premises; and, consequently, in such cases the lessor can only proceed at common law, as before the statute.⁵ The distress, however, must be such that the landlord could have availed himself of it; and, therefore, where the tenant locked up the premises, so that his goods could not be distrained without rendering the landlord a trespasser, it was held that proof of this fact was sufficient to satisfy the statute, which meant no sufficient distress upon the premises which could be got at.⁶ When proceeding under that statute, also, he was bound to show a compliance with all the requirements of the common law, before he could avail himself of a condition of re-entry.⁷

¹ Norton v. Sheldon, 5 Cow. 448.

² 2 N. Y. R. S. 505, § 30. See §§ 301, 492, 493, *post*.

³ *Ibid*.

⁴ Jackson v. Hogeboom, 11 Johns. 163. There is no right to re-enter unless reserved in the lease. Den v. Post, 1 Dutch. 286.

⁵ Doe v. Wandlass, 7 T. R. 117; Doe v. Roe, 9 Dowl. 548; Farley v. Craig, 3 Green, 192. If plaintiff enters by virtue of a clause of re-entry, he must be entitled so to do by the terms of his contract; and must show the absence of a sufficient distress on the premises or excuse himself from the necessity of attempting a distress. *Ibid*.

⁶ Doe v. Dyson, Mood. & M. 77.

⁷ Jackson v. Kipp, 3 Wend. 280; Jackson v. Wykoff, 5 *id*. 53. See

And under the English statute, it has been held that this provision has not done away with the necessity of a demand of rent, if the lease requires it; although such a demand need not be made with all the particularity required at common law.¹

§ 302. **Re-entry on Notice in New York.**— But the statute of New York, which abolishes distress for rent, authorizes a re-entry for the non-payment of rent, whether there are sufficient goods on the premises or not, in all cases where the right of re-entry has been reserved in the lease, provided that fifteen days' notice of an intention to re-enter be given to the lessee, or be left at his dwelling-house.² This right of re-entry on fifteen days' notice is cumulative upon the former one, which requires the landlord to prove the absence of a sufficient distress; and both may subsist together, and the landlord may elect between them.³

§ 303. **Summary Process provided for.**— Instead of, and in some cases in addition to, the formal action of ejectment, the statutes of most of the States provide that the lessor may enforce his right to the premises by a summary proceeding in some cases after ten, in others after fourteen or more, days' notice and demand. But as substantially the same form of proceeding exists whether the ground of removal be a forfeiture by breach of condition in the demise, or a statutory dispossession for non-payment of rent, or because the tenant holds over his term, or forcibly detains the premises, we have considered the features of this process elsewhere, under the head of remedies.⁴

Coon v. Brickett, 2 N. H. 163; Hamilton v. Elliott, 5 S. & R. 375; Gray v. Blanchard, 8 Pick. 284.

¹ Doe v. Shawcross, 3 B. & C. 752.

² Laws of 1846, c. 369. The constitutionality of this law was affirmed in Van Rensselaer v. Snyder, 18 N. Y. 299.

³ Williams v. Potter, 2 Barb. 316. Though the common-law mode of re-entry is not taken away by this statute, an entry under it does not require the formalities, as to demand, of a common-law entry. Van Rensselaer v. Snyder, *supra*.

⁴ §§ 493, 494, 713, 728, notes and cases cited, *post*.

CHAPTER VIII.

COVENANTS ON THE PART OF THE LESSOR.

SECTION I.

THE COVENANT FOR QUIET ENJOYMENT.

§ 304. **Defined. — What it implies. — Runs with the Land. — Lessor's Fraud. —** The principal covenant on the part of a landlord is that his tenant shall have the quiet enjoyment and possession of the premises during the continuance of the term. The law supposes that when a man makes a lease, he has a good title to the land, and, consequently, power to lease it; and an engagement to this effect on the part of a lessor is therefore always implied. It is also to be understood, as a condition of the lessor's right to demand rent, that the lessee shall not be disturbed in his possession of the demised premises during the term, by the lessor or any other person rightfully claiming under him.¹ But although this covenant is always implied on the part of a lessor in every tenancy for a fixed period however short,² it is usual to insert, among other pro-

¹ *Mack v. Patchin*, 42 N. Y. 167; *Sigmund v. Howard Bk. of Balt.*, 29 Md. 324; *Holder v. Taylor*, Hob. 12; *Ludwell v. Newman*, 6 T. R. 458; *Baughner v. Wilkins*, 16 Md. 35; and see *Burwell v. Jackson*, 9 N. Y. 535; *Owens v. Wright*, 5 McCrary, 642; *Field v. Herrick*, 10 Bradw. (Ill.) 591. It is held that the implied covenant for quiet enjoyment may be modified or restrained by express covenants inconsistent therewith. *O'Connor v. Memphis*, 7 Lea, 219. And where the lessee receives and holds possession of part only of the premises, it may become a question of fact whether or not he has waived the full performance of the lessor's covenant. *Prior v. Kiso*, 81 Mo. 249. See § 252, *ante*, and notes.

² Per Parke, B., in *Hart v. Windsor*, 12 M. & W. 85. In *Mershom v. Williams*, 68 N. J. L. 398, it was held, upon elaborate consideration, that the implied covenant for quiet enjoyment does not arise from the mere relation of landlord and tenant, even if this is created by lease under

visions of the lease, an express covenant for the lessee's quiet enjoyment and to save him harmless from all persons claiming title, upon his performance of those stipulations which are obligatory upon him.¹ [When the word "grant" or "demise" is used in the creation of the tenancy] this covenant runs with the land, and is obligatory upon every person who becomes legally possessed of the land.² [It is to be observed that fraudulent representations on the part of the lessor, as to his title, by relying on which the lessee is damaged, may give the lessee a right of action, independent of that arising upon the covenant.³ Thus where the lessee was induced to hire a wharf from the plaintiff by the lessor's fraudulent representations that the right mentioned in the lease included a lot of land which in fact belonged to a stranger, it was held, in an action for the rent, that the lessee was entitled to a deduction of the sum which he was obliged in good faith to pay for a seal; but that if the word "demise" or "grant" is used the covenant will be implied. The English rule is that, in the absence of the word "demise" the law will not imply a covenant for title as distinguished from a covenant for quiet enjoyment; and that, although the law would imply a covenant for quiet enjoyment, such implied covenant would not enure beyond the termination of the lessor's estate. *Baynes v. Lloyd*, 1895, 1 Q. B. 820, 1895, 2 Q. B. 610, and see *Adams v. Gibney*, 6 Bing. 656; *Penfold v. Abbott*, 32 L. J. Q. B. 67.

¹ It was held in *Kinney v. Watts*, 14 Wend. 38, that, under 1 R. S. 738, § 140, forbidding the implication of covenants in deeds, no covenant for quiet enjoyment could be implied in a lease, or other conveyance of terms for years where the term exceeded three years; but the Court of Appeals overruled this case, in *Mayor v. Mabie*, 18 N. Y. 151, and held that such an instrument is not a conveyance of real estate, within the meaning of the statute. And see *Vernam v. Smith*, 15 N. Y. 332. But a lease in perpetuity, or in fee, reserving rent, is a conveyance of real estate, within the statute, and if it contains no covenant for quiet enjoyment, none will be implied. *Carter v. Burr*, 39 Barb. 59. Under a lease by the State of the use of so much of the surplus water, not required for navigation, of the Wabash and Erie Canal as would be sufficient to propel certain machinery in the lessee's mills, it was held that the implied covenant for quiet enjoyment was to hold so long as the canal was used for purposes of navigation, and while there was, during that period, a surplus of water. *Hoagland v. N. Y., Chic. & St. Louis R. R.*, 111 Ind. 443.

² *Shelton v. Codman*, 3 Cush. 318.

³ *Milliken v. Thorndike*, 103 Mass. 382.

lease of that lot, and that the fact that the demise was not of the wharf, but of the lessor's right to it, made no difference.¹]

§ 305. **What it intends.** — This covenant, whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers.² [Thus the landlord is not liable for trespasses committed by another tenant;³ and a lessee cannot be released from the obligation of his covenant to pay rent merely because a prior tenant, whose term has expired, holds over without right.⁴ So it has been held that the renting of premises to a tenant who carries on therein a trade which renders inconvenient the occupation of an adjoining tenant of the same landlord, does not amount to an eviction of the latter tenant.⁵ But where premises are leased subject to certain uses in an adjoining tenant of the same landlord, as where adjoining farms are drained by a common artificial drain running under both, the landlord will be liable for a breach of the covenant, if in the ordinary use of his right by the other tenant the lessee's enjoyment is disturbed by the fault of the landlord; as where such a drain had been imperfectly and improperly constructed by the landlord. On the other hand, if the disturbance arises solely from the adjoining tenant's fault, as by excessive and improper use of the drain, the landlord is not liable.⁶] Thus the covenant is only equivalent to a stipulation that the lessee shall not be rightfully disturbed in his possession during the term; not that he shall not be disturbed at all. All that it requires is, that the lessor shall have such a title at the time of the demise as shall enable him to make a good lease for the term demised.⁷ But any

¹ *Whitney v. Allaire*, 4 Den. 554, 1 N. Y. 305.

² *King v. Reynolds*, 67 Ala. 229.

³ *Abrams v. Wilson*, 59 Ala. 524.

⁴ *Field v. Herrick*, 101 Ill. 110; *McNairy v. Hicks*, 8 Baxt. 378.

⁵ *Gray v. Graff*, 8 Mo. App. 329. See § 316, *post*.

⁶ *Sanderson v. Mayor of Berwick*, 13 Q. B. D. 547, and see § 309 *a, post*.

⁷ *Gardner v. Keteltas*, 3 Hill, 330; *Knapp v. Marlboro'*, 34 Vt. 285; *Grist v. Hodges*, 3 Dev. 388; *Underwood v. Birchard*, 47 Vt. 305.

interference with the possession of the lessee by the lessor, more than a trespass, will amount to a breach of the covenant, in whatever form it may happen.¹ If the lessor merely covenants against the acts of a particular person, his general obligation is restricted and a molestation by that person only, can be the ground of a breach of the covenant.² If the covenant is contained in a lease for life, the lessor is bound, under the general covenant, to make it good against all men ; but if it be a lease for years, then only as against all persons claiming through himself or those from whom he claims title. If the tenant is ousted by one having no title, this is a trespass for which the law leaves him to his remedy against the wrongdoer, since it arises from no fault of the landlord.³

§ 306. **Broken only by Disturbance or Withholding of Possession.**—While the covenant implied from words of specific demise extends to title, and so may be broken whenever a covenant for seisin, or right to convey, or even a covenant against incumbrances would be broken;⁴ the covenant for

¹ *Mayor v. Mabie*, 13 N. Y. 151; *Fuller v. Ruby*, 10 Gray, 258; *Lounsberry v. Snyder*, 31 N. Y. 514. An interference with the person of a tenant by the landlord, although on the demised premises, is a trespass and not an eviction. *Vatel v. Herner*, 1 Hilt. 149, 285. A covenant of seisin, which resembles a lessor's implied covenant for title, extends to the whole of the granted premises and includes everything which is parcel of the realty and which would pass by the deed if it belonged to the grantor; and, in such case, if a fence on the premises does not belong to him, the covenant is broken. *Mott v. Palmer*, 1 N. Y. 564.

² *Gardner v. Keteltas*, *supra*; *Howell v. Richards*, 11 East, 642. Where a lease contains a covenant for quiet enjoyment, without molestation or disturbance from the lessor his successors or assigns, no further covenant in respect to enjoyment will be implied. *Burr v. Stenton*, 42 N. 462.

³ *Iggulden v. May*, 9 Ves. 330; *Noble v. King*, 1 H. Bl. 34; *Noke's Case*, 4 Co. 80, b; *Lloyd v. Tomkies*, 1 T. R. 671; *Dudley v. Folliott*, 3 *id.* 584; *Andrews's Case*, Cro. El. 214; *Greenby v. Wilcocks*, 2 Johns. 1; *Ellis v. Welch*, 6 Mass. 246; *Kimball v. Grand Lodge of Masons*, 131 *id.* 59; *Schilling v. Holmes*, 22 Cal. 327; *Moore v. Weber*, 71 Pa. St. 429; *Schuykill Co. v. Schmoele*, 57 *id.* 271.

⁴ *Miller v. Thornton*, 1 Duv. 369; *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145. Here the landlord's title failing as to part, the tenant was allowed to rescind or to elect to retain the part to which the land-

quiet enjoyment, arising from the same words, like the express covenant to the same effect, extends to possession alone; and is broken only by an entry, expulsion, or actual disturbance of possession by the lessor or by one holding a paramount title; or by the lessor's withholding possession.¹ Thus where the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment by Y. who had the lawful title to the premises; it was held a good objection that it did not appear that Y.'s title commenced by any act of the defendant, prior to the assignment made by him to the plaintiff; who might, therefore, have been evicted by means of some act done by himself, since the assignment.² The intendment that the title of the party evicting was derived from the plaintiff may be precluded by averring that the person evicting entered by lawful title which accrued to him before the date of the conveyance to the plaintiff,³ or that the party evicting entered by virtue of a title theretofore made by, from, and under the defendant.⁴ [It is held that the tenant may be estopped to set up an ouster by the landlord; as by remaining in possession without offering to surrender after access to the premises has been made less convenient,⁵ or where he takes the lease knowing that his access to the premises was to be shared in common with others;⁶ or by continuing to pay rent.⁷]

lord had title. The covenant of seisin is not broken where the grantor making it has had exclusive occupation by his tenant, under a claim of title, for thirty-one years next preceding the covenant. *Ginn v. Hancock*, 31 Me. 42. Seisin in fact is sufficient. *Marston v. Hobbs*, 2 Mass. 489; *Griffin v. Fairbrother*, 10 Me. 95.

¹ *Whitbeck v. Cook*, 15 Johns. 483; *Webb v. Alexander*, 7 Wend. 281; *Mattoon v. Monroe*, 20 Hun, 75; *Boreel v. Lawton*, 90 N. Y. 293; *Boothby v. Hathaway*, 20 Me. 251; *Howard v. Doolittle*, 3 Duer, 464.

² *Noble v. King*, 1 H. Bl. 34; *Baughner v. Williams*, 16 Md. 35. The mere commencement of an action of ejectment, which is dismissed as not being legally maintainable, is not an eviction. *Ager v. Winslow*, 123 Cal. 587.

³ *Buckly v. Williams*, 3 Lev. 325.

⁴ *Hodgson v. E. Ind. Co.*, 8 T. R. 278.

⁵ *Beecher v. Duffield*, 97 Mich. 423.

⁶ *Benedict v. Harding*, 79 Wis. 551; and see *Galloway v. Bonesteel*, 65 *id.* 80; *Jarstadt v. Smith*, 51 *id.* 96.

⁷ *Ralph v. Lomer*, 3 Wash. 401.

§ 307. **Certain Words of, construed.** — A covenant for quiet enjoyment against “any interruption of, from, or by the grantor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim, any estate, &c., in the premises, by, from, under, or in trust for him or them, or by, through, or with his or their acts, means, default, privity, or consent,” was adjudged to extend to an area of quit-rent, due at the time of the conveyance, although it was not shown that the rent accrued during the time the grantor held the estate.¹ The lessor’s indemnity usually extends against the acts of himself and his heirs and all others claiming under him;² but as to the persons who are construed to come within the meaning of the phrase “all persons claiming under him,” it has been decided that a person taking under an execution of a power of appointment is within the terms of a covenant for quiet enjoyment without any let, suit, &c., of the appointer, his heirs or assigns, or any person or persons claiming, or to claim by, from, or under him; although the estate proceeded from the wife of the appointer, and he and she both joined in exercising the power.³ This covenant runs with the land, and is, therefore, binding on the assignees of the reversion; and may be availed of by the assignees of the term.⁴

§ 308. **Guarantees Possession, and not Title.** — [By the theory of the common law] the express covenant of quiet enjoyment goes to possession, and not to title, and is broken only by an entry and expulsion, or by some actual disturbance in the possession [and it was held formerly that actual ouster, or physi-

¹ *Howes v. Brushfield*, 3 East, 491.

² And where this is the case he is not liable for a disturbance by the paramount title. *Dennett v. Atherton*, L. R. 7 Q. B. 316. On the same principle, where the tenant has notice of a restriction in the lease, as where the lessee reserves the right to sell the premises during the term, the exercise of it is not a breach of this covenant. *O'Connor v. Daily*, 109 Mass. 235; *Shaw v. Appleton*, 161 *id.* 313.

³ *Hurd v. Fletcher*, 1 Doug. 43; *Evans v. Vaughan*, 4 B. & C. 261.

⁴ *Campbell v. Lewis*, 3 B. & A. 392; s. c. 8 Taunt. 715. See § 262, *ante*, and notes. The implied covenant for title in the words “demise,” &c., does not run, but like the covenants for seisin, &c., which it resembles, is broken when made. See § 263, *ante*, and notes.

cal dispossession, was necessary to a breach of the covenant¹]. An outstanding judgment against the lessor, or a lease by him to another under which no entry or attempt at entry is made, or the mere existence of a mortgage on the property before foreclosure and sale, was not therefore, in either case, deemed a breach of this covenant.² But although a lawful eviction in some form must be shown, it need not be an eviction by process of law;³ it is enough that, on a valid claim being made by a third person, the plaintiff voluntarily yielded up the possession. If, however, he surrenders the possession without a legal contest, he assumes the burden of proving that the person entering had title paramount.⁴ The eviction must appear to have taken place before suit brought.

§ 309. **Breach of, Effect of Certain Acts to create.** — The mere act of forbidding a tenant to pay rent to the plaintiff, unaccompanied by any other disturbance, will not amount to a breach.⁵ Nor can a lease by the riparian owner of a batture between the public road and a river be annulled by a lessee

¹ *Waldron v. McCarty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 *id.* 120; *Webb v. Alexander*, 7 Wend. 281; *Kerr v. Shaw*, 13 Johns. 236; *St. John v. Palmer*, 5 Hill, 599; but see *Moffatt v. Strong*, 9 Bosw. 57; § 309 *a*, *post*.

² *Sedgwick v. Hallenback*, 7 Johns. 376; *Mills v. Sampsel*, 53 Mo. 360; *Stanard v. Eldridge*, 16 Johns. 254; *Clark v. Lineberger*, 44 Ind. 223.

³ *Parker v. Dunn*, 2 Jones (N. C.), 203.

⁴ *Greenvault v. Davis*, 4 Hill, 643; *Cowan v. Silliman*, 4 Dev. 46; *Hamilton v. Cutts*, 4 Mass. 349; *Booth v. Starr*, 5 Day, 282; *Camarillo v. Folsom*, 49 Cal. 202; *Dunklee v. Koper*, 44 Ga. 266. Where it is shown by parol that, after the delivery of a deed with a covenant against incumbrances, the grantee accepts an existing tenancy and receives the rent from the tenant, the amount of rent received is properly to be deducted from his damages in an action for breach of the covenant by reason of the outstanding tenancy. *Edwards v. Clark*, 83 Mich. 246.

⁵ *Witchcot v. Nine*, 1 Brownl. & G. 81. Nor where the lessor had prevented parties from hiring of the lessee. *Ogilvie v. Hull*, 5 Hill, 52. Nor a demand of possession by one having title. *Cowan v. Silliman*, 4 Dev. 46. But where the lessor had also denied lessee's title and brought suit against him and his sublessees to dispossess them, this was held a breach. *Levitzky v. Canning*, 33 Cal. 299. And in *Leadbeater v. Roth*, 25 Ill. 587, mere prohibition was held an eviction.

who has not been disturbed, on the ground that the premises are part of the river bank, the use of which is free and not susceptible of being leased.¹ Under this covenant, the landlord is not bound to rebuild a house in case of its destruction by fire; nor does such an event amount to an eviction. But it has been held to be so if the landlord has expressly agreed to rebuild or keep the premises in repair and neglects to do so.² Nor will any acts of molestation, even if committed by the landlord himself or by a servant at his command, amount to a breach of the covenant, unless they are more than a mere trespass.³ This covenant is intended to insure to the lessee, legal right to enter and enjoy the premises, and if he is prevented from entering by a person already in, under a paramount title, an action lies.⁴ [And if the lessor intentionally


¹ *N. O. Carrolton Co. v. Winthrop*, 5 La. Ann. 36.

² *Brown v. Quilter*, Ambler, 619; *Myers v. Burns*, 33 Barb. 401; *Womack v. McQuarry*, 28 Ind. 103. But see *Leavitt v. Fletcher*, 10 Allen, 119, where lessor's non-performance of his covenant to repair was held no bar to his suit for rent after the destruction of the premises; and see §§ 329, 330, 375, *post*, and notes.

³ *Bennett v. Bittle*, 4 Rawle, 339; *Hayner v. Smith*, 63 Ill. 430; *Dimmock v. Daly*, 9 Mo. App. 354; but acts of trespass may amount to an eviction; *Upton v. Townend*, 17 C. B. 30. In *Ogilvie v. Hull*, 5 Hill, 54, it was said: "No principle is better settled, or more uniformly adhered to, than that there must be an entry, and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving the tenant of the beneficial enjoyment of the demised premises, to operate a suspension or extinguishment of rent. But to constitute a breach of the covenant it is sufficient that the lessee's ordinary and lawful enjoyment be substantially interfered with by acts of the lessor or those claiming under him, though neither the title to, nor possession of, the land be otherwise affected. *Sanderson v. Mayor of Berwick*, 13 Q. B. D. 547." See § 309 *a, post*. Thus where one let a stall in a market and afterwards discontinued the use of the building as a market, induced the other tenants to surrender their stalls, extinguished the lights of the market except those at the tenant's stand, and closed the doors except the one in front of such stand, this was held an eviction. *Denison v. Ford*, 7 Daly, 384. But where on tenant's abandoning, the landlord receives the key from a third party, repairs, and puts up "to let" on the premises, this is not an eviction. *Pier v. Carr*, 69 Pa. St. 326; *Oastler v. Henderson*, 2 L. R. Q. B. Div. 575.

⁴ *Ludwell v. Newman*, 6 T. R. 458; *St. John v. Palmer*, 5 Hill, 599; *Williams v. Weatherbee*, 2 Aik. 329; *Hamilton v. Cutts*, 4 Mass. 349.

puts it out of his power to deliver the possession of the premises to the lessee, without the lessee's consent, the act is of the same nature as an eviction.¹] In such cases, no ouster or expulsion is necessary, on which to predicate a suit, for the lessee is not bound to enter and commit a trespass;² it must, however, be shown expressly that he was kept out by a title existing in a third person at or before the execution of the lease.³ [It may be stated as a general rule that, in order to constitute an eviction, there must be not a trespass merely, by the landlord, but something of a permanent character done to deprive, and which does deprive, the tenant of the use of the demised premises or some part thereof.⁴ It is not a defence to a tenant's claim that his rights under the lease have been invaded and infringed upon, to say that the invasion and



¹ *Riley v. Hale*, 158 Mass. 240; *Berrington v. Casey*, 78 Ill. 317; *Hall v. Burgess*, 1 B. & C. 332. In *Giles v. Dugro*, 1 Duer, 331, the defendant in the assignment of a lease to the plaintiff covenanted that the premises were free of all incumbrances; but it appeared that, prior to the assignment, he had sold and assigned to one S. the privilege of using the wall on the premises as a party-wall of a building to be erected during the unexpired term of the lease. It was held that such prior assignment was not a mere license, but was an absolute grant, creating a permanent incumbrance, and, therefore, a breach of the defendant's covenant; and that, S. having actually used the wall as the party-wall of a building he had erected, this amounted to an eviction of the plaintiff, and entitled him to substantial damages.

² 1 Saund. 322; *Grannis v. Clark*, 8 Cow. 36.

³ *Beddoe v. Wadsworth*, 21 Wend. 120.

⁴ *Meeker v. Spalsbury*, 66 N. J. L. 60. Thus a tenant is evicted from a room in a building when the only access to it is denied him, *Grove v. Youell*, 110 Mich. 285; but a landlord's breach of a covenant to perform certain services for the tenant, in the way of furnishing supplies and machinery for his business, is not an eviction. *Bean v. Fitzpatrick*, 67 N. H. 225. Erecting an enclosure around and pulling down the walls of a burned building under orders of the municipal authorities is not an eviction, *Fleming v. Bowles*, 100 Ga. 449 (see § 519, *post*); nor merely entering the premises without the express consent of the tenant and having bricks cleaned. *Ibid.* Where a sink in an upper story of a building, in control of the landlord, became clogged by the fault of a stranger so that it overflowed and damaged a tenant's goods in the story below, it was held that the landlord was not liable. *Rosenfeld v. Newman*, 59 Minn. 156.

infringement were the acts of another tenant, when such acts were performed with the landlord's consent and active concurrence.^{1]}

[§ 309 *a*. **Actual Physical Ouster not necessary.** — Whatever may have been the doctrine of the ancient law,² actual ouster or physical dispossession is not now necessary to constitute a breach of the covenant for quiet enjoyment. The prevailing doctrine now is, that after a demand or other hostile assertion of the paramount title the lessee may yield thereto, taking the risk of its being the superior title; and his attornment or purchase, without any actual change of possession, will be a constructive eviction and breach of the covenant.³ So an act which disturbs the lessee's possession, if unnecessary, although done ostensibly under the direction of the law, may amount to an eviction. Thus if the lessor of a room in a building in a city, having notice from the inspector of buildings in that city that the building is deemed by him unsafe, takes down the building, unnecessarily, when he might cause it to be made safe, as authorized by the statute to do, without taking it down or disturbing the lessor's possession; this is a breach of the covenant. In such a case, it will be a question of fact whether the taking down of the building was necessary.⁴ So the interference with the tenant's light and air may amount to a breach of the covenant, when it materially changes the character and lessens the value of the leased premises, and is inconsistent with the tenant's rights under his lease.⁵ This view of the law is not

¹ *Twiss v. Baldwin*, 9 Conn. 291; *Clement v. Gould*, 61 Vt. 578; *City Power Co. v. Fergus Falls Water Co.*, 55 Minn. 172. See *Collins v. Lewis*, 53 *id.* 78.

² See § 308, *ante*; §§ 378–381, *post*.

³ *Grist v. Hodges*, 8 Dev. 200; *Sprague v. Baker*, 17 Mass. 586; *Loomis v. Bedel*, 11 N. H. 74; *Moore v. Vail*, 17 Ill. 190; *Curtis v. Deering*, 12 Me. 501; *Univ. Vt. v. Joslyn*, 21 Vt. 52; *Brown v. Dickerson*, 12 Pa. St. 872; *Holbrook v. Young*, 108 Mass. 88. But such attornment must be shown. *Hawes v. Shaw*, 100 *id.* 187.

⁴ *Kansas Investment Co. v. Carter*, 160 Mass. 421. See *Taylor v. Plymouth*, 8 Met. 462.

⁵ *Brande v. Grace*, 154 Mass. 210; *Case v. Minot*, 158 *id.* 577. See *Jenkins v. Jackson*, 40 Ch. D. 71; *Robinson v. Kilvert*, 41 *id.* 88, 97;

inconsistent with the rule that the owner of land takes it without any easements of light and air, as against surrounding owners;¹ since as between landlord and tenant there is a privity of contract and estate, which does not subsist as between different owners of adjacent lands. So acts done on adjacent property of the landlord, not included in the lease, which interfere with the tenant's access to the premises,² the failure of the landlord to heat the premises, he having covenanted so to do,³ and the operating of boilers under the leased rooms so as to make the floors and walls of these uncomfortable and unhealthy,⁴ or the maintenance of an obnoxious sewer, amounting to a nuisance, by the landlord on his adjoining land,⁵ may amount to an eviction. The rule is that while an eviction was originally a dispossession of the tenant by some act of his landlord, or by failure of the latter's title, it has now come to include any wrongful act of the landlord either of commission or omission which may result in a substantial interference with the tenant's possession or enjoyment, in whole or in part.⁶ Actual force is not essential to constitute a wrongful eviction.⁷]

§ 810. To constitute Breach, Eviction must be by Lawful Title. — The eviction must be by title both lawful and paramount; accordingly, where the eviction was by a subordinate title, which however the grantee had precluded himself from

Fish v. Dodge, 4 Den. 811, and, *contra*, *Keating v. Springer*, 146 Ill. 481, and cases cited.

¹ See § 239, n., *ante*.

² *Conlon v. McGraw*, 66 Mich. 194.

³ *Bass v. Rollins*, 63 Minn. 226.

⁴ *Boyer v. Commercial Ind. Co.*, 110 Iowa, 491.

⁵ *Sully v. Schmidt*, 147 N. Y. 248, or for pumping water onto the tenant's land. *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 836.

⁶ *Oakford v. Nixon*, 177 Pa. 176.

⁷ *Tallman v. Murphy*, 120 N. Y. 845, distinguishing *Gilhooley v. Washington*, 4 N. Y. 217; *Tarpy v. Blume*, 110 Iowa, 469. In the latter case it was held that an eviction may be effected by the serving of a notice to quit, within a specified time prior to the expiration of the period for which the tenant is entitled to possession, the moving of property into the buildings without the tenant's consent, and the latter's leaving the premises in consequence thereof.

contesting by his own acts and declarations, it was held that he could not maintain an action on this covenant.¹ [So an under-lease contained a covenant for quiet enjoyment by the lessee "without any interruption from or by him" (the tenant's lessor). The owners of the reversion upon the original lease recovered possession of the premises under a condition of re-entry contained in such lease for non-payment of rent, and it was held that there was no breach of the covenant for quiet enjoyment, the interruption being the act of the superior landlord, not that of the sublessor.²] And where a third person recovered in trespass against the grantee, it was held that the grantor was not liable on this covenant, unless it was shown that before and at the date of the covenant he had lawful title, and by virtue thereof entered and ousted the plaintiff.³ But if a lessee, to prevent a violent expulsion from the premises, without waiting for the judgment of the court yields possession, and attorns in good faith to one who has a title paramount and an immediate right of possession, this is equivalent to an ouster and is a defence to the lessor's action for rent.⁴

§ 811. **When an Actual Ouster necessary to constitute a Breach.** — A mere recovery in ejectment against the cove-

¹ Kelly v. Dutch Church of Schenectady, 2 Hill, 105; Hoppes v. Cheek, 21 Ark. 585.

² Kelly v. Rogers, 1892, 1 Q. B. 910, and see Stanley v. Hayes, 8 Q. B. 105. After the mortgagees of the lessee of a mine had taken possession of the leasehold interest and placed a custodian in charge, the lessor entered and took and retained sufficient possession to prevent the mortgagees from working the leased property by locking up the buildings and leaving a man in charge to retain such possession. It was held that such acts amounted in law to a substantial eviction of the mortgagees, and relieved them from the payment of rent. Pendill v. Eells, 67 Mich. 657.

³ Webb v. Alexander, 7 Wend. 281; Lansing v. Van Alstyne, 2 Wend. 565, n.; Phelps v. Sawyer, 1 Aik. 150; Maverick v. Lewis, 3 McCord, 211. In Salmon v. Smith, 1 Wms. Saund. 204, note 2, it is said that, to suspend rent, there must be an expulsion or eviction of the lessee; and the plea must state his eviction or expulsion, and keeping him out of possession until after the rent became due. So, Paige v. Parr, Style, 432.

⁴ Morse v. Goddard, 13 Met. 177; Moffatt v. Strong, 9 Bosw. 57; § 809 a, ante.

nantee is not a breach of the covenant, unless there be an actual ouster by writ of possession.¹ But a decree in equity, directing a defendant to execute a deed and deliver possession of the land, is held to be equivalent to an ouster; and the fact that the decree is founded on a notice to him when he took the deed, of an equity in the land, does not bar this action.² And although the mere existence of a better title is not a breach of the covenant, yet if it be accompanied with possession under it, commenced before the deed which contains the covenant was executed, it will amount to a breach.³ The covenantee is not bound to defend, after notice to the covenantor and refusal on his part to defend;⁴ and the notice in such case is not required to be in writing.⁵

§ 312. **Lessee's Right to expel Wrong-doer in Possession.**—**Covenant may be extended.**—If the party holding is a wrong-doer, the remedy of the lessee is as perfect and effectual to dispossess him after, as was that of the lessor before the execution of the lease, either by ejectment or by summary proceedings under the statute. Therefore, where the lessee is prevented from entering into possession on the day stipulated for the commencement of possession, by a former tenant who holds over after his term has expired, his remedy is against the latter, and not against the lessor.⁶ But the covenant may extend to all interruptions, legal or illegal, where there is a clear purpose expressed so to protect the lessee; as, if the covenant be that the party shall enjoy against all claiming or pretending to claim, any right. In this case

¹ *Kerr v. Shaw*, 13 Johns. 236; *Kortz v. Carpenter*, 5 Johns. 120.

² *Martin v. Martin*, 1 Dev. 413. Where the tenant was enjoined by the landlord from enjoying the rented premises and the injunction was dissolved, it was held that the tenant might recover damages by an action on the case for the injury thus done him. *Hubble v. Cole*, 88 Va. 236.

³ *Grist v. Hodges*, 3 Dev. 200.

⁴ *Jackson v. Marsh*, 5 Wend. 44.

⁵ *Miner v. Clark*, 15 Wend. 425; *Bronson, J.*, dissenting.

⁶ *Gardner v. Keteltas*, 3 Hill, 330; *Gozzolo v. Chambers*, 73 Ill. 75; *Mechanics' Ins. Co. v. Scott*, 2 Hilt. 550; *Underwood v. Birchard*, 47 Vt. 805; *Sigmund v. Howard Bank*, 29 Md. 324; §§ 176, 177, *ante*.

there was a pretence of right of common set up to two closes comprehended in the lease, and it was considered to be the intent of the parties that all disturbance should be guarded against; for if legal claims only were included the tenant would be subjected to the hardship of trying the right for the landlord, which was the thing the tenant desired to prevent by this covenant.¹ But in an action on a covenant to save harmless against all lawful and unlawful titles, it must appear that he who entered did not claim under the lessee.²

§ 313. **Generally, Molestation must amount to Prohibition of Enjoyment.** — A mere personal wrong will not amount to a breach of this covenant; the molestation must be such as concerns the estate, and amounts to a prohibition of enjoyment; for if any one, even the lessor, enters and beats or assaults the lessee, the lessor cannot be charged on the covenant for such a disturbance.³ But if the covenant indemnifies the lessee against a particular person by name, the covenantor is bound to defend him against the entry of that person, whether by title or otherwise, and whether such entry be lawful or not.⁴ It was formerly held that where a lessee assigned his term for years, and covenanted that the original lease was good, a previous lease granted by the assignor amounted to a breach, notwithstanding the plaintiff, before the assignment, had notice of the lease, and had been attorned to by the under-tenant; and this, although no actual disturbance had arisen to the lessee.⁵ But this has since been held otherwise in this country, and with better reason.⁶ And although the mere existence of a previous mortgage, under

¹ *Southgate v. Chaplin*, 1 Comyn, 289; s. c. 10 Mod. 384; *Lucy v. Levington*, 1 Vent. 175; *Hunt v. Allen*, Winch, 25.

² *Norman v. Foster*, 1 Mod. 101.

³ *Ellis v. Welch*, 6 Mass. 246; *Playter v. Cunningham*, 21 Cal. 229; *Penn v. Glover*, Cro. El. 421; *Seddon v. Senate*, 13 East, 72; *Noble v. Warren*, 38 Pa. St. 340.

⁴ *Foster v. Mapes*, Cro. El. 212; *Haynes v. Bickerstaff*, Vaugh. 118; *Fowle v. Welsh*, 1 B. & C. 29.

⁵ *Ludwell v. Newman*, 6 T. R. 458; *Levett v. Withrington*, 1 Lutw. 817.

⁶ *Pease v. Christ*, 31 N. Y. 141.

which the lessee is liable to be dispossessed, does not constitute an eviction, the hostile assertion of the mortgage title, if paramount, will be such, if the covenantee yields thereto, and, either by purchase or attornment, holds under it, although his possession may never actually be changed.¹

§ 314. **Eviction, how to be alleged.** — An averment of eviction under an elder title is not always necessary to sustain an action upon the covenant; for if the grantee be unable to obtain possession, in consequence of an existing possession or seisin in one claiming and holding under an elder title, this is equivalent to an eviction.² And where the breach assigned was, that at the time of the demise to the plaintiff, one B. had lawful right and title to the premises, and, having such right and title, entered and ejected the plaintiff; it was objected that the plaintiff, in alleging the eviction, ought to have shown the title of B.; or at least to have averred that B. had such a title as was inconsistent with the plaintiff's right to possession; for although it was alleged that he had lawful right and title to the premises, he might only have had a right to recover in a real action, and not a right of entry; and that this mode of pleading might give cover to an eviction by collusion. But the court held that if the declaration was certain to a common intent it was sufficient; that it would be doing violence to the words to say that the lawful right and title which it was stated B. had did not legalize his entry; and that the fair import of the words was that he had lawful right and title to do that which he did.³

§ 315. **Ouster from Part of Premises treated as Eviction at Tenant's Option.** — It is implied that the tenant shall have the

¹ See § 308, *ante*, and authorities cited.

² *Duvall v. Craig*, 2 Wheat. 45; *Andrews v. Paradise*, 8 Mod. 818; *Grannis v. Clark*, 8 Cow. 36. And the law laid down in *Kortz v. Carpenter*, 5 Johns. 120, seems contrary to the doctrine generally now prevailing. In *Walker v. Tucker*, 70 Ill. 327, the withholding parcel of the demise was considered an eviction. So *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145. But the burden is on the tenant to show the hostile title to be paramount. *Underwood v. Birchard*, 47 Vt. 305.

³ *Foster v. Pierson*, 4 T. R. 617.

free use of the whole of the premises ; and if he is ousted from any material part thereof, he may treat it as an eviction from the whole, and throw up the lease : nor will he any longer be responsible for rent¹ [or for a proportionate part thereof ; if he remains in occupation of a part²]. If he prefers, he may retain possession of that part of the property from which he has not been evicted, and sue the landlord for such damages as he has sustained from the partial eviction.³ Therefore, if a man makes a lease of a house with estovers, and then destroys all the wood, the lessee may have an action of covenant.⁴ So where a landlord let certain premises with a portion of an adjoining yard, and agreed that the tenant should have the use of the pump in the yard jointly with himself “as long as it should remain there ;” though it was held that these words gave the landlord liberty to remove the pump at his pleasure, yet if those words had not been introduced, the landlord could not have taken it away or deprived the tenant of the use of it, without subjecting himself to damages for a breach of the covenant.⁵ And if a man should lease premises with a

¹ *Etheridge v. Osborn*, 12 Wend. 529; *Hay v. Cumberland*, 25 Barb. 594; *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326; *Little v. McArdus*, 38 Mo. App. 187.

² *Leishman v. White*, 1 Allen, 489; *Christopher v. Austin*, 11 N. Y. 216; *Skaggs v. Emerson*, 50 Cal. 3; *Grundin v. Carter*, 99 Mass. 15; *Hayner v. Smith*, 63 Ill. 430; *Cunning v. Boom Co.*, 188 Mich. 237; *Dolton v. Sickel*, 66 N. J. L. 492; *Morris v. Kettle*, 57 *id.* 218; and see § 379, and notes, *post.* A restriction of the mode of user of the premises, enforced by the owner of the paramount title, is not a breach of the covenant. *Dennett v. Atherton*, L. R. 7 Q. B. 316; *Fillebrown v. Hoar*, 124 Mass. 580.

³ *Dudley v. Folliott*, 3 T. R. 584; *Noble v. King*, 1 H. Bl. 34. Or he may quit possession, and sue for an eviction from the whole premises, for all damage incurred, other than what was measured by his rent. *Chatterton v. Fox*, 5 Duer, 64; *Morrison v. Chadwick*, 7 C. B. 266, 284.

⁴ *Pomfret v. Ricroft*, 1 Saund. 321.

⁵ *Rhodes v. Bullard*, 7 East, 116. So in *Levitzky v. Canning*, 33 Cal. 29, use by the lessor for a time of the roof of the demised premises as a washroom. In *Grabenhorst v. Nicodemus*, 42 Md. 236, refusal by lessor of a distillery to give a certificate required by law to enable lessee to get a license, without which he could not work the distillery, was held an eviction. In an action for damages in obstructing the lights of the plaintiff's tenement, brought by a tenant for a year against his landlord,

watercourse on them, and afterwards stop the watercourse, the tenant may consider it an eviction or recover damages therefor. [And where, the landlord being bound to repair, in consequence of want of repair of water-pipes a tenant was deprived of the easement to use water and abandoned the premises, it was held that the landlord could recover rent only for the period during which the premises were occupied.¹ But the rule does not apply if the supply ceases through drouth or other unavoidable causes, although the lessor expressly covenanted to supply the premises with water as they were then supplied, i.e. from a natural spring flowing through pipes.²] If the landlord covenants for the quiet enjoyment of a certain close, and afterwards sets up a gate across a lane leading to the close, by which the lessee is obstructed in passing to it; this will amount to a breach of the covenant.³ It was said to be immaterial whether the gate was erected by right or by wrong; for, in either case, being an obstruction, it should not have been erected.⁴ So on the lease of a messuage with a garden, and a house or office at the further end thereof, a covenant for the quiet enjoyment of the demised premises was held to be broken by the building of a mansion-house on part of the garden.⁵

during the term, he can recover damages only for the time elapsed when the suit was commenced. *Blunt v. McCormick*, 3 Den. 283.

¹ *West Side Savings Bank v. Newton*, 76 N. Y. 616.

² *Ward v. Vance*, 93 Pa. St. 499.

³ *Salman v. Bradshaw*, Cro. Jac. 804; *Ludwell v. Newman*, *supra*; *Andrews v. Paradise*, 8 Mod. 318. But in *Elliott v. Aiken*, 45 N. H. 30, on a lease of premises with a steam-engine, not mentioned specifically in the lease, a withdrawal of power from the engine and entry on the demised premises to cut holes for belting from the engine, was held not an eviction.

⁴ *Andrews v. Paradise*, *supra*. So an action may be maintained on this covenant for the disturbance of a way of necessity. Per Mansfield, C. J., in *Morris v. Edginton*, 3 Taunt. 24.

⁵ *Kidder v. West*, 3 Lev. 167. In a similar case, where the lessee held under a lease for ten years it was held that equity would interfere to restrain the erection of the building, since the damage to the lessee might properly be considered as irreparable. *Raband v. Frank*, 7 Mo. App. 64. See *Lufkin v. Zane*, 157 Mass. 117. But where the tenant holds from month to month only, he has not such interest as to entitle him to an in-

§ 316. **Immoral Acts of Landlord equivalent to Eviction.**—The tenant may also be deprived of the enjoyment of the premises by the gross moral turpitude of the landlord; and his conduct will then be equivalent to an eviction. Where the lessor habitually brought lewd women under the same roof with the demised tenement, whose outcries and indecent conversation destroyed the tenant's beneficial occupancy, in consequence of which he quitted; this was held to be an eviction.¹ But this has been considered an extreme case.² And if a tenant abandons the premises and resists the payment of rent subsequently accruing, on the ground that other apartments in the same building, adjoining or below his, are occupied as a place of riot and prostitution, he must show that his landlord created the nuisance by leasing the apartments for that purpose, or that it existed by his connivance and consent.³

§ 317. **Damages for Breach of the Covenant.**—The former rule of damages in an action for the breach of the covenant of enjoyment was to give nominal damages and costs only, with such mesne profits as the tenant was compelled to pay the real owner.⁴ But this rule has never been regarded with much favor, junction to restrain a nuisance injurious to his possession. *Clarke v. Thatcher*, 9 *id.* 436.

¹ *Dyett v. Pendleton*, 8 Cow. 727. This case is doubted in *Gray v. Gaff*, 8 Mo. App. 329.

² See *Etheredge v. Osborn*, 12 Wend. 529, 532; *Ogilvie v. Hull*, 5 Hill, 52, 54; *Royce v. Guggenheim*, 106 Mass. 201, 204; § 309 *a*, *ante*.

³ *Gilhooley v. Washington*, 4 N. Y. 217. In this case, Bronson, C. J., says: "In the equitable action for use and occupation, the English courts hold that the tenant is not answerable, unless he has had the beneficial enjoyment of the property, and they have gone a great way in protecting the tenant against disturbances of all kinds; but the principle of these cases has never been applied to an action of covenant for the non-payment of rent, which does not depend on the act of occupation or enjoyment." And even where the action is for use and occupation, he will be liable until he quits. *De Witt v. Pierson*, 112 Mass. 8.

⁴ *Kelly v. Dutch Ch.*, 2 Hill, 105; *Mock v. Johnson*, 1 *id.* 99; *Baldwin v. Munn*, 2 Wend. 399. This rule was derived from that in regard to conveyances in fee, where the grantor was only held to repay the consideration money and interest; and as the tenant was relieved of rent, which was the consideration paid by him, it was thought he should not receive anything for the market value of his term over this. 4 Kent,

and has been relaxed and modified from time to time, in order to prevent the injustice which might otherwise be done to lessees in particular cases. Thus where a lease was made to commence from a future day, and the owner, before the commencement of the term, leased the premises to another person, it was held that the original lessee was not limited to his action of ejectment, but might sue for damages for a breach of the implied agreement to give him possession, and recover the difference between the rent reserved in the lease, and the full value of the term.¹ [Upon an executory contract to give a lease and a failure or refusal to give it, while the former rule of damages was applied, if the inability or refusal was without any fault or fraud on the part of the promisor; if, on the other hand, the refusal to give the lease resulted from the fraudulent conduct of the defendant, consequent special damages might be recovered.²] In an action against a lessor, for a refusal to give possession of the demised premises, the lessee was allowed to recover the damages arising from the expenses incurred in preparing to remove and to occupy the premises, with the real value of the rent, and the sum agreed to be paid.³ In a similar case the court held that the plaintiff's damages were not confined to the mere difference of rent *Com. 479*; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Conger v. Weaver*, 20 N. Y. 140; *Bender v. Fromberger*, 4 Dall. 441.

¹ *Dean v. Roesler*, 1 Hilt. 420; *Trull v. Granger*, 8 N. Y. 115.

² Per Bosworth, J., 1 Duer, 342; citing *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Den. 546; *Bitner v. Brough*, 11 Pa. St. 127. But in Pennsylvania, when an eviction occurs by paramount title, without fraud on the lessor's part, the former rule is adhered to, and merely nominal damages are allowed. *Lanigan v. Kille*, 13 Phila. 68; 97 Pa. St. 120. See *Wood v. Sharples*, 174 Pa. 588, and *Penn. Iron Co. v. Diller*, 118 *id.* 635, where it is said that the measure of damage for the breach of a covenant in a lease is the actual damage which resulted from the actual breach, and not the value of the lease. And it is held that evidence of previous annual profits is admissible in estimating damages recoverable for wrongful eviction. *Raynor v. Van Blatz Brew'g Co.*, 100 Wis. 414, but not profits made in a business illegally carried on on Sundays. *Ibid.*

³ *Giles v. O'Toole*, 4 Barb. 261. A lessee, by taking possession under a lease which he was induced to accept by fraud, waives thereby only his right to rescind the contract, and not his right to recover the damages occasioned by the fraud. *Whitney v. Allaire*, 1 N. Y. 305.

which he might have obtained, over and above what he was to pay, but that the jury might look to the actual value of the bargain which he had made.¹ It has also been held that when a tenant was evicted before the expiration of his term, in a case where the landlord had it in his power to prevent the ouster but did not, he might recover the difference between the value of his lease for the unexpired term, and the rent he had stipulated to pay.² The principle of these decisions was subsequently confirmed, and it is now held that on a breach of the covenant for quiet enjoyment in a lease, whether express or implied, where an eviction is occasioned through any fault of the lessor, the measure of damages is the value of the unexpired term, less the rent reserved.³ [In

¹ *Driggs v. Dwight*, 17 Wend. 71.

² *Chatterton v. Fox*, 5 Duer, 64. And if evicted at a season of the year when the expense of removal is greater than it would have been at the expiration of the term, he may also recover the extra expense. *Ibid.* See also *Rickett v. Lostetter*, 19 Ind. 125; *Shaw v. Hoffman*, 25 Mich. 162; *Wilson v. Raybould*, 56 Ill. 417; *Dyer v. Wightman*, 66 Pa. St. 455. And even exemplary damages may be given if the ouster is attended with circumstances of aggravation. *Smith v. Wunderlich*, 70 Ill. 426.

³ *Mack v. Patchin*, 42 N. Y. 167; *Denison v. Ford*, 7 Daly, 384; *Same v. Same*, 10 *id.* 412. The rule stated is said now to be firmly settled. *Cannon v. Wilbur*, 30 Neb. 777; *Karbach v. Fogel*, 63 *id.* 601, and see *Dodds v. Hakes*, 114 N. Y. 260; *Taylor v. Cooper*, 104 Mich. 73; *Jonas v. Noel*, 98 Tenn. 440; *Robrecht v. Marling*, 29 W. Va. 766; *Kenney v. Collier*, 79 Ga. 743. So the measure of damages for the eviction of a life tenant consists of the rental value of the premises from the eviction to the date of the writ, and the present worth of the rental value from that time for the tenant's life expectancy. *Grove v. Youell*, 110 Mich. 285. When the lessee obtains possession of the premises, and enjoys the quiet use thereof during the term, the damages are nominal. *Harms v. McCormick*, 132 Ill. 104. But the rule is not everywhere accepted. The later cases in New York hold that in the absence of fault upon the part of the lessor, the lessee can recover for a breach of a covenant of quiet enjoyment only such rent as he has advanced, and such mesne profits as he is liable to pay over. *Matter of Strasburger*, 132 N. Y. 128. It is held in the same State, that where a lessee of premises for business purposes has been evicted and his business broken up by the unlawful acts of his landlord, the prospective profits of his business for the remainder of the term is a proper item of damages. *Schile v. Brokhahus*, 80 N. Y. 614; *Snow v. Pulitzer*, 142 *id.* 263, and a like rule is held in Missouri. *Murphy v. Century Build'g Co.*, 90 Mo. App. 621; *Gildersleeve v. Over-*

England, the rule laid down in *Kelly v. Dutch Church*¹ seems now to be repudiated and it is held that "The true measure of damages for the breach of such a contract is what the plaintiff has lost by the breach."² The courts of some of the States have never adopted the narrow rule first referred to, but have held uniformly that the measure of damages on an eviction is not to be estimated by the amount of rents, or the lessee's profits, but simply by the real improved value of the lease at the time of the eviction.³ Where the eviction has been only partial, the recovery is of course proportioned to the value [not the quantity] of that part of the premises to which the title has failed.⁴

stolz, id. 518. It is held that where property is leased for a special purpose, known to the lessor, and possession is refused because of a prior lease to another party, the lessee may recover as damages his actual and necessary expenses incurred in preparing for the occupation of the property in the manner contemplated by the parties. *Friedland v. Myers*, 139 N. Y. 432, and see *Poposkey v. Munkwitz*, 68 Wis. 322; *Jefcoat v. Gunter*, 73 Miss. 539. It is held that the measure of the tenant's damages for injury to goods caused by the leaking of water through a defective roof, in case the landlord is liable therefor, is the difference between the market value of the goods immediately preceding the injury and their market value immediately thereafter. *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764.

¹ *Ubi supra*.

² Per Blackburn, J., in *Locke v. Furze*, L. R. 1 C. P. 441, and see *Williams v. Burrell*, 1 M. G. & S. 402.

³ *Dexter v. Manley*, 4 Cush. 14; *Gore v. Brazier*, 3 Mass. 523; *Hardy v. Nelson*, 27 Maine, 525; *Hosford v. Wright, Kirby*, 3. In *Fillebrown v. Hoar*, 124 Mass. 580, it was held that the evicted tenant might recover damages for injury to his feelings caused by the eviction but not for injury to his health. The value of the property at the time of the eviction is the measure of damages. *Smith v. Strong*, 14 Pick. 128; *Caswell v. Wendell*, 4 Mass. 108; *Jewett v. Brooks*, 134 Mass. 505. "On the question of damages, it is competent for a lessee to prove the condition and capacity of the works from which he has been evicted, with the cost of manufacturing the articles, and their price at the store, as well as in the market." Per Shaw, C. J., in *Dexter v. Manley, supra*.

⁴ *Morris v. Phelps*, 5 L. R. 49; *Hunt v. Orwig*, 17 B. Mon. 73; *Cornell v. Jackson*, 3 Cush. 506. See also *Michael v. Mills*, 17 Ohio, 601. A tenant while in possession of the rented premises cannot maintain a bill to enjoin the landlord from trespassing upon the rented premises, upon the ground that there was a breach of the covenant of quiet enjoyment, since in such case an action at law upon an implied covenant of

SECTION II.

THE COVENANT AGAINST INCUMBRANCES.

§ 318. **What constitutes an Incumbrance.** — Another important covenant on the part of the landlord is for indemnity against incumbrances; or that the tenant shall enjoy the premises free from incumbrances made or to be made by the landlord, his heirs, or assigns. Without this covenant, a tenant may be obliged to defend his possession, in the middle of a term, by reason of some prior incumbrance, or be subjected to the burden of some inconvenient easement unknown to him when he accepted the lease, and this without adequate redress for the injury he may sustain. On general principle, every right to, or interest in land, granted to the diminution of the value of the land but consistent with the passing of the title, is considered an incumbrance.¹ An inchoate right of dower, or a right of way over the premises, is of this description. So the owner of one of two adjoining lots may be bound by prescription to maintain the whole of the division fence between them. All such easements amount to incumbrances on the land.²

§ 318 *a*. **Liability of Life Tenant to keep down Incumbrances.** — The obligation to protect a tenant against incumbrances arises only in favor of a tenant for years; for if a life estate is charged with an incumbrance, the tenant is not entitled to indemnity from the remainder-man; since he is bound in equity to keep down the interest, taxes, ground rents, and such other annual charges as accrue during his occupation, out of the profits [or income] of the estate. He is not charge-

quiet enjoyment, would furnish the tenant adequate relief. *Deegan v. Neville*, 127 Ala. 471.

¹ *Prescott v. Trueman*, 4 Mass. 627. Words sounding in covenant only may operate to grant an easement whenever it is necessary to give them that effect in order to carry out the manifest intent of the parties. *Greene v. Creighton*, 7 R. I. 1; *Holmes v. Seller*, 3 Lev. 305.

² *Adams v. Van Alstyne*, 25 N. Y. 282; *Bronson v. Coffin*, 108 Mass. 175.

able with the incumbrance itself nor bound to extinguish it;¹ although he must pay a just proportion of any assessment for a permanent public improvement, made during his time, which benefits the inheritance.² But he contributes only during the time he enjoys the estate; and where there are successive life estates, and a subsequent life tenant is compelled to pay arrears of interest upon charges affecting the inheritance which had accrued during a prior life estate, he is entitled to repayment out of the inheritance.³ If he neglects to discharge the taxes, or other charges incumbent upon him, a receiver may be appointed to lease out the premises until he collects rent enough to pay such charges.⁴ If the incumbrancer neglects to collect his interest from the tenant for life, he may still collect all arrearages from the remainder-man;⁵ and the estate of the tenant for life will be bound to indemnify the remainder-man for the arrearage of interest accrued in his life-time; since the tenant for life must keep down the interest, even though it should exhaust the rents and profits;

¹ *Swaine v. Perine*, 5 Johns. Ch. 482; *Saville v. Saville*, 2 Atk. 463; *Shrewsbury v. Shrewsbury*, 1 Ves. 233; 4 Kent, Com. 74; *Cairns v. Chabert*, 3 Edw. 312; *Prettyman v. Walston*, 34 Ill. 175; *Varney v. Stevens*, 34 Me. 361; *Hughes v. Young*, 5 Gill & J. 67; *McMillan v. Robbins*, 5 Ohio, 28; *Burhans v. Van Zandt*, 7 N. Y. 523; *Trustees v. Dunn*, 22 Barb. 402. A water tax specifically charged for a particular use confined to the apartments of the tenant for life, should be borne by such party. *Graham v. Dunigan*, 2 Bosw. 516; *Booth v. Ammerman*, 4 Bradf. 129, 216. So where there was a devise of a dwelling-house to the wife of the testator for life, although stated in the will to be free and clear of all incumbrances. *Lawrence v. Holden*, 3 Bradf. 142; and see *Hepburn v. Hepburn*, 2 *id.* 74.

² *Sarles v. Sarles*, 2 Sandf. Ch. 601; *Mosely v. Marshall*, 23 N. Y. 200; *Fleet v. Dorland*, 11 How. Pr. 489. Such assessments are usually apportioned between the life tenant and the residuary owners, according to the age of the life tenant. *Miller's Estate*, 1 Tuck. (N. Y. Surr.) 346; *Peck v. Sherwood*, 56 N. Y. 615. This rule was applied to insurance on the property and to lightning-rods affixed thereto. *Ibid.* As to the tenant's liability under his express covenant to pay taxes, &c., see § 398, *post*.

³ *Casborne v. Scarfe*, 1 Atk. 603; *Penrhyn v. Hughes*, 5 Ves. 99; *Burhans v. Van Zandt*, 7 N. Y. 523; *Kirwan v. Kennedy*, 4 Ir. Eq. R. 499.

⁴ *Cairns v. Chabert*, *supra*; *Hughes v. Young*, 5 Gill & J. 67.

⁵ *Roe v. Pogson*, 1 Madd. 582.

and the whole estate is to be at the charge of the principal in just proportions.¹

§ 319. **Generally, Prospective Disturbance will constitute Breach of.** — In order to justify an action on this covenant, it is not necessary that the tenant should actually be prevented from enjoying the premises. The chance of his being disturbed, and his liability to satisfy claimants, or, in other words, the mere existence of an outstanding incumbrance which may defeat the estate, constitutes a technical breach of the covenant, notwithstanding the incumbrance is suffered to lie dormant; but more than nominal damages can be recovered until actual injury has been sustained.² But if the covenant extends merely to protection against certain incumbrances, it is broken only by an entry and expulsion from the premises or by some disturbance in the possession in consequence thereof.³ To an action on a covenant in the assignment of a lease for enjoyment free and clear of all arrearages of rent, assigning as a breach that the rent was in arrear and unpaid, it was held a sufficient defence that the defendant left so much money in the hands of the plaintiff as would suffice to discharge the rent then in arrear.⁴ But if a lessee, subject to a condition for re-entry on non-payment of rent, underlets and covenants for quiet enjoyment without the interruption of himself or of any other person occasioned by his procurement or consent, his default in paying the rent, by means whereof the under-lessee is evicted, is a breach of the covenant.⁵

§ 320. **Previously existing Mortgages.** — A covenant against incumbrances, if broken by a mortgage previously given by the

¹ 4 Kent, Com. 74; *Rowel v. Walley*, 1 Rep. in Ch. 218; *Mosely v. Marshall*, *supra*.

² *Jenkins v. Hopkins*, 8 Pick. 346; *Chapel v. Bull*, 17 Mass. 220; *Barrett v. Porter*, 14 *id.* 143; *People v. Nelson*, 13 Johns. 340; *Jackson v. Sternberg*, 20 *id.* 49.

³ *Anderson v. Knox*, 2 Ala. 156. As to when a fraudulent concealment of incumbrances will justify a rescission of the contract, see *Cullum v. Br. Bank*, 4 Ala. 21.

⁴ *Griffith v. Harrison*, 4 Mod. 249.

⁵ *Stevenson v. Powell*, 1 Bulst. 182.

grantor, is broken at the time the deed is delivered ;¹ and the tenant need not, as we have seen, be actually evicted, to enable him to sustain an action.² And an exception, immediately following the covenant, of a certain mortgage to a specified amount, operates as a qualification of the covenant; which is broken if the mortgage exceeds that amount.³ But if a lease for years is cut off by the foreclosure of a mortgage executed prior to the lease, the lessee will have an equitable interest, to the extent of the value of the remainder of his term, in the surplus moneys arising from the sale of the premises ; and the court will order payment to be made to him or his assigns, after satisfaction of any prior claims there may be upon the equity of redemption. Nor does the application of this rule seem to be incompatible with any additional claim for indemnity which the tenant may have under the covenant.⁴

§ 321. **Other Pre-existing Incumbrances.** — An assessment for a street opening is an incumbrance from the time of the order to open ; and its existence is a breach of the covenant, although the grantor had only constructive notice of the widening when he executed the lease. The liability to the assessment is not created by the adjudication which confirms the assessment, but by the fact that benefit is received from the widening and is to be estimated as of the former date.⁵ A pre-existing right to pass over the land to take water from a spring in it is a breach of the covenant; and so is a public highway over the land,⁶ or a right to use a wall upon the demised

¹ *Bean v. Mayo*, 5 Greenl. 94; *Ingersoll v. Jackson*, 9 Mass. 495; *Stewart v. Drake*, 4 Halst. 141; *Funk v. Voneida*, 11 S. & R. 109; *Davis v. Lyman*, 6 Conn. 249; *Stanard v. Eldridge*, 16 Johns. 254; *Wyman v. Ballard*, 12 Mass. 804; *Hall v. Dean*, 13 Johns. 105.

² *Chapman v. Holmes*, 5 Halst. 28; *Garrison v. Sandford*, 7 *id.* 261; *Tufts v. Adams*, 8 Pick. 547.

³ *Potter v. Taylor*, 6 Vt. 676.

⁴ *Clarkson v. Skidmore*, 2 Lans. 238; 46 N. Y. 297.

⁵ *Cochran v. Guild*, 106 Mass. 29; *Jones v. Boston*, 104 *id.* 461.

⁶ *Harlow v. Thomas*, 15 Pick. 66; *Mitchell v. Warner*, 5 Conn. 497; *Herrick v. Moore*, 19 Me. 313; *Butler v. Gale*, 27 Vt. 739. Otherwise as to a public highway in actual use: *Scribner v. Holmes*, 16 Ind. 142; or a mortgage which the covenantee is bound to pay: *Watts v. Welman*, 2 N. H. 458.

premises as a party-wall.¹ And evidence is not admissible to show that the grantee knew of the existence of the easement when he accepted the lease.² It has been held that a previous sale of part of the land, by articles of agreement to that effect, is an incumbrance on the legal estate.³ So an inchoate right of dower is an existing incumbrance, not a mere possibility or contingency.⁴ And an agreement for an under-lease and to take the furniture at a valuation, may be void, if, on taking possession, the rent is found to be in arrear, and a charge on the goods.⁵ The words "permitting" and "suffering" do not bear the same meaning as "knowing of" and "being privy to;" the meaning of the former is that the party shall not concur in any act over which he has control, and the covenant extends only to such permissive acts of the lessor as had through that permission an operative effect in charging the estate.⁶ If a covenant against incumbrances has been broken before an assignment by the lessee, and the incumbrances have not been removed, the benefit of the covenant will pass to the assignee, so as to entitle him to damages he may sustain after the assignment; for this is not a mere assignment of a chose in action, but there is a continuing breach, and the ground of damage has since been enlarged.⁷

§ 322. **Damages for Breach of Covenant.** — The rule of damages, upon the breach of a covenant against incumbrances, is said to be the amount which the plaintiff has lawfully paid to discharge the incumbrance; but if he has not paid off the incumbrance he is still entitled to nominal damages, because an outstanding incumbrance is a technical breach of the covenant;

¹ *Giles v. Dugro*, 1 Duer, 331. . But a party-wall which creates a community of interest between adjoining proprietors is not a legal incumbrance. *Hendrick v. Stark*, 37 N. Y. 106.

² *Kellogg v. Ingersoll*, 2 Mass. 97; *Hubbard v. Norton*, 10 Conn. 431; *Prichard v. Atkinson*, 3 N. H. 335. But see *Whitbeck v. Cook*, 15 Johns. 483.

³ *Seitzinger v. Weaver*, 1 Rawle, 382.

⁴ *Porter v. Noyes*, 2 Greenl. 22.

⁵ *Partridge v. Sowerby*, 3 B. & P. 172.

⁶ *Hobson v. Middleton*, 6 B. & C. 295.

⁷ *Sprague v. Baker*, 17 Mass. 586.

although it does no harm, until the tenant is evicted under it, or until he pays it, which he may do without waiting to be evicted.¹ And after he has been evicted, the cost he has incurred in defending the action by which he was evicted will form part of the damages he will be entitled to recover.² With respect to an incumbering easement, the rule of damages is said to be the proportionate value of the easement, to the value of the demised premises.³

SECTION III.

FOR FURTHER ASSURANCE.

§ 323. **Defined. — Implied in Covenant for Quiet Enjoyment. — Runs with the Land. —** A third covenant on the part of a landlord which is sometimes inserted in a lease is the covenant for further assurance; by which the lessor contracts that he will at any time perform and execute such further reasonable acts, writings, and conveyances of or relating to the premises, as the lessee may be advised are necessary for completing the transfer of the interest, or term which the parties have contracted for. This covenant is not often used, because the covenant for quiet enjoyment necessarily implies that the lease is a good and valid demise; so that the granting of an imper-

¹ *Dimmick v. Lockwood*, 10 Wend. 142; *Delavergne v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 *id.* 105; *Stanard v. Eldridge*, 16 Johns. 254; *Prescott v. Trueman*, 4 Mass. 627; *Garfield v. Williams*, 2 Vt. 327; *Garrison v. Sandford*, 7 Halst. 261. In an action on the covenant of seisin, to ascertain the measure of damages, the true consideration, and the fact that part only of it has been paid, may be shown by parol, although the deed expresses a different consideration and acknowledges that the whole of it has been paid; and there is no occasion, in such a case, to resort to equity for relief. *Bingham v. Weiderwax*, 1 N. Y. 509. The amount fairly paid to remove the incumbrance will be the measure of damages: *Comings v. Little*, 24 Pick. 266; though paid after the action has been commenced. *Brooks v. Moody*, 20 *id.* 474. But if the sum paid exceeds the whole value of the estate, the measure of damages is that value only. *Norton v. Babcock*, 2 Met. 210.

² *Waldo v. Long*, 7 Johns. 173.

³ *Giles v. Dugro*, 1 Duer, 331.

fect lease would be a breach of the latter covenant. It is always, however, inserted in conveyances of freehold property, and sometimes in assignments of leasehold premises; and its advantage is that where a defect is discovered in the title which can be supplied by the grantor, the grantee may require specific performance. It is a covenant running with the land, of which an under-tenant may avail himself as well as the original lessee;¹ and may be important to both, inasmuch as it relates both to the title of the lessor and to the instrument of conveyance; operating as well to secure the performance of all acts for supplying defects in the former, as to remove objections to the sufficiency and security of the latter.

§ 324. **Obligations of Lessor under.** — If there be a defect in the title, the lessor will be decreed, under this covenant, to convey to the lessee such a title as he may afterwards obtain; even although he may have acquired it by purchase and for a valuable consideration.² Under it, also, a lessee may require the removal of a judgment, or other incumbrance which endangers his possession.³ And where a defendant, by an agreement of present demise, let certain premises to the plaintiff, which the parties in possession refused to surrender, it was held that the defendant was bound to put the plaintiff in possession, as a contract so to do was implied in such letting; and that the plaintiff might maintain an action for the breach of such a contract, and was not obliged to resort to ejectment against the wrongful occupant.⁴ But where a party covenanted that he had not done, permitted, suffered to be done, any act whereby the estate was incumbered, it was held that his assent to an act which he could not have prevented was not a breach of the covenant.⁵ Nor is an entry by the lessee a disseisin in fact, unless the entry be forcible, or with a mani-

¹ *Middlemore v. Goodale*, Cro. Car. 503.

² *Middlebury College v. Cheney*, 1 Vt. 336; *Taylor v. Debar*, 1 Ca. in Ch. 274; s. c. 2 *id.* 212; *Seabourne v. Powell*, 2 Vern. 11; and see *Langford v. Pitt*, 2 P. Wms. 630.

³ *King v. Jones*, 5 Taunt. 427. A mortgagor is not bound to release his equity of redemption. *Atkins v. Uton*, 1 Ld. Ray. 36.

⁴ *Coe v. Clay*, 5 Bing. 440.

⁵ *Hobson v. Middleton*, 6 B. & C. 295.

fest intention to disseise. A disseisin being the wrongful act of a stranger, it is not a breach of the covenant against defects in the title, that the person under whom the vendor derives title had leased part of the premises sold to one who had afterwards entered on the demised premises.¹

§ 325. **Reasonable Acts required by, are Necessary Acts.** — The term “reasonable act,” generally used in this covenant, means such an act as the law requires to be done; but if it be unnecessary it is not a reasonable act, nor one required by law. Therefore, a refusal to do something which, if executed, would be useless and nugatory; as, to direct trustees to raise money by mortgage to pay an annuity already provided for by a demise of the premises, will not constitute a breach of the covenant.² And to make such assurance as the lessee’s counsel shall advise requires that the counsel shall give his advice, and that the covenantor shall be notified thereof. It also requires that the covenantee shall procure the instrument to be drawn and tendered to the covenantor for execution.³

§ 326. **Obligation of Covenantor to execute Deed.** — According to the early cases, if a covenantor can read the proposed deed, he is bound to execute and deliver it immediately upon its being tendered to him for execution; and he will not be allowed time to obtain the opinion of counsel, although he may not be acquainted with the legal sense and operation of the words or be able to know whether or not they are embraced in his covenant. But, if it is written in a language he does not understand, he may refuse to deliver it until he can procure some one to explain it to him.⁴ This rule does not appear to exist in our law; for in an action upon a covenant for further assurance, “as by the plaintiff or his counsel should

¹ *Jerrit v. Weare*, 3 Price, 575. A wrongful possession does not divest the title of the person against whom possession is held adversely. *Doe v. Hull*, 2 D. & R. 38.

² *Warn v. Bickford*, 9 Price, 43.

³ *Bennet’s Case*, Cro. El. 9; *Stafford v. Bottorne*, *id.* 298; *Baker v. Bulstrode*, 1 Mod. 104.

⁴ *Manser’s Case*, 2 Co. 3, a; *Wotton v. Cooke*, 3 Dy. 337, b; 1 Roll. Abr. 441; *Symms v. Smith*, Cro. Car. 299.

be reasonably devised, advised, or required," the breach assigned was that the plaintiff had requested the defendant to make a lawful and reasonable assurance to the plaintiff of the right of dower of defendant's wife, yet the said defendant had not made such assurance, &c. On demurrer, it was held that the assignment was bad, for the plaintiff, or his counsel, were to devise the further assurance, and, after having done so, the plaintiff was bound to give notice thereof to the defendant, allowing him a reasonable time to consider of it; and that such facts ought to be averred.¹

SECTION IV.

THE COVENANT TO REPAIR.

§ 327. **Not an Implied Covenant.— Mere Promises to Repair.** — The landlord sometimes covenants to repair; but although his own interest will generally prevent him from suffering the premises to run into decay, the tenant cannot compel him to repair, unless he has bound himself by an express agreement to that effect.² The common law has always thrown the

¹ *Millar v. Parsons*, 9 Johns. 336; *Sweitzer v. Hummel*, 3 S. & R. 228.

² *Turner v. Townsend*, 42 Neb. 376. See §§ 175 *a*, *ante*, 328, *post*. The common-law rule is not in force in Georgia. Under the code, § 8123, the landlord in the absence of a contrary stipulation is bound to keep the premises in repair, upon receiving notice from the tenants that they are out of repair. *Guthman v. Castleberry*, 48 Ga. 72; *Stack v. Harris*, 111 *id.* 149. But a written contract in which the tenant stipulates to make all needful repairs, "except the putting on of a new roof, new doors, and new floors," exempts the landlord from making any repairs other than those expressly excepted, and even from making those unless they are needed and called for by the tenant. *Powers v. Cope*, 93 *id.* 248. It seems that a covenant on the part of the lessor, "to put and keep" the roof of a building on the premises in good repair, does not imply that the roof was out of repair to the knowledge of lessor at the time of the leasing, and, in the absence of proof that such was the fact, an action for breach of the covenant is not maintainable until after notice of a defect has been given by the lessee. *Thomas v. Kingsland*, 108 N. Y. 616. Where the lessee is to keep the premises in repair except as to "unavoidable accidents and natural wear and tear" no covenant on the part of the lessor is to be implied to repair damages caused by unavoidable accidents. *Kline v. McLain*, 33 W. Va. 32.

burden of repairs upon the tenant, as being, in fact, as a bailee of the premises, and bound to restore them substantially as he received them.¹ [A mere verbal agreement, or promise, of the landlord to make repairs on premises which the lessee holds under a covenant, on his own part, to keep the premises in repair, cannot be enforced against the landlord, since the promise merges in the written lease.² And such a promise based upon the tenant's agreement to relinquish an expressed purpose of abandoning the premises, cannot be supported, for want of consideration.³ But an agreement of the landlord to repair, made for sufficient consideration and not inconsistent with the lease, may be supported. Thus the acceptance of a lease containing a covenant that the lessee will give up the premises to the lessor at the end of the term in as good order and condition "as the same now are or may be put into by the lessor," is a sufficient consideration for an agreement, executed and delivered by the lessor contemporaneously with the lease and which refers in terms to the lease, and in which the lessor binds himself to make forthwith certain repairs.⁴ Where the lessee of a room in a building agreed to make needed repairs in and about the room, it was held that the lessor was impliedly bound to keep the residue of the building in repair so as to protect the room.⁵]

§ 328. **In Absence of, Landlord not bound for Repairs. — Statutory Modifications of the Rule.** — In conformity to this principle, it was held that, at common law, "it is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do so. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent."⁶ In an early case, where there was a lease

¹ *Foster v. Bott*, 6 Mass. 63.

² *Hartford &c. St. Co. v. Mayor*, 78 N. Y.

³ *Eblin v. Miller*, 78 Ky. 271.

⁴ *Vass v. Wales*, 129 Mass. 88.

⁵ *Bissell v. Lloyd*, 100 Ill. 214.

⁶ *Mumford v. Brown*, 6 Cow. 475; *Davis v. Bancks*, 2 Sweeny, 184; *Sherwood v. Leaman*, 2 Bosw. 127; *Post v. Vetter*, 2 E. D. Smith, 248; *Withey v. Matthews*, 52 N. Y. 512; *Kellenberger v. Foresman*, 18 Ind.

of a house, with the use of a pump standing on the lessor's premises, it was held that the tenant had no remedy against the landlord for suffering the pump to be out of repair, unless he had agreed to keep it in repair.¹ So, where a tenant, under a covenant to repair, pulled down a party-wall (being in a ruinous condition), and rebuilt it at the joint expense of himself and the occupant of the adjoining house, to whom he had given notice in the landlord's name but without his authority, he was not allowed to maintain an action against his landlord for a moiety of the expense of rebuilding such party-wall.² [In

475; *Estep v. Estep*, 23 *id.* 114; *Biddle v. Reed*, 33 *id.* 529; *Casad v. Hughes*, 27 *id.* 141; *Benjamin v. Henry*, 51 Ill. 492; *Colbeck v. Girdlers Co.*, 1 L. R. Q. B. Div. 234; *Elliott v. Aiken*, 45 N. H. 30; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Wooley v. Osborne*, 39 *id.* 54; *Samuel v. Scott*, 13 Phila. 64; *Hanson v. Cruse*, 155 Ind. 176; *Bonaparte v. Thayer*, 95 Md. 548. Thus on lease of a hotel: *Howard v. Doolittle*, 3 Duer, 464; *Morris v. Tillson*, 81 Ill. 607; of salt-works: *Clark v. Babcock*, 23 Mich. 164; of water-works: *Skillen v. Water-works*, 49 Ind. 193; or where the want of repair is in the public way: *Fisher v. Thirkell*, 23 Mich. 1; *Pretty v. Bickmore*, *supra*; §§ 175, 176, 327. The rule is extended to apply to parts of premises not expressly demised, but necessary to the tenant's protection or convenience. *Krueger v. Ferrant*, 29 Minn. 385; and see *Wilkinson v. Clauson*, *id.* 91. Nor will a landlord's liability to make repairs be implied from the fact that he holds as trustee under a will which directs him to make repairs, and that the lease is in terms made subject to the provisions of the will. *Wheeler v. Crawford*, 86 Pa. St. 327. He is not liable for injuries to the tenant by want of repair: *Brewster v. DeFremery*, 33 Cal. 341; *Doupè v. Genin*, 45 N. Y. 119; *Joyce v. DeGiverville*, 2 Mo. App. 596; *Spellman v. Bannigan*, 36 Hun, 174; *McAlpin v. Powell*, 55 How. Pr. 163; *Mendel v. Fink*, 8 Bradw. (Ill.) 378; but he is liable for unskilful repairs; *Gill v. Middleton*, 105 Mass. 477. In *Meany v. Abbott*, 6 Phila. 256, it was held that if the lessor employed a competent workman, he was not liable for his negligence. And from want of repairs, he is not liable to third persons for injuries. § 175, *ante*.

¹ *Pomfret v. Ricroft*, 1 Saund. 321; 7 East, 116; *Surplice v. Farnsworth*, 7 M. & G. 576; *Gott v. Gandy*, 2 Ellis & B. 845. A lessor is not bound to repair the water-pipes outside the demised premises, so as to keep up a supply of Croton water. *Coddington v. Dunham*, 3 Jones & S. 412.

² *Pizey v. Rogers*, Ry. & M. 857; *Leslie v. Smith*, 32 Mich. 64. In New York, if the leased building, without fault or neglect of treatment, shall be destroyed, or be so much injured by the elements or any other cause as to become untenable, and unfit for occupation, the landlord

some jurisdictions, the common-law rule has been abrogated or essentially qualified. In England, "in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation."¹ In Minnesota, if a building becomes untenable during the term of a lease, the lease is terminable at the option of the lessee.² In California the statute gives the option to the tenant, after notice to landlord, to make repairs not requiring an expenditure of more than a month's rent, the cost thereof to be deducted from the rent, or to vacate the premises discharged from the performance of the conditions of the lease.³ In Georgia a statutory duty to repair is imposed upon the landlord after notice in the absence of any covenant on the subject.⁴ The Civil Code of Louisiana, following the civil law, and differing from the common law, regards a lease for years as a mere transfer of the thing leased; and holds the landlord bound, without an express covenant, to keep the property in reasonable repair and fit for the use for which it is leased, even when the want of repair, or the unfitness is caused by an inevitable accident; and if he fails to do this the tenant may have the lease annulled or the rent abated.⁵]

must repair. Laws 1860, c. 345, and see § 375, *post*. This act does not affect the common-law rule requiring a tenant to make ordinary repairs. *Suydam v. Jackson*, 54 N. Y. 450. And if the lessee continues in possession to the end of his term the statute has no application. *Chadwick v. Woodward*, 13 Abb. N. C. 441; s. c. 17 Hun, 163.

¹ 48 & 49 Vict. c. 72, § 12. See *Walker v. Hobbs*, 23 Q. B. D. 458.

² Laws 1883, c. 100. See *Boston Block Co. v. Buffington*, 39 Minn. 385.

³ Civil Code, §§ 1941, 1942; *Van Every v. Ogg*, 59 Cal. 563; *Tatum v. Thompson*, 86 *id.* 203; *Green v. Redding*, 92 *id.* 548; *Gately v. Campbell*, 124 *id.* 520. A landlord is only required to make and keep a dwelling-house tenantable, except as to such deterioration or injury as is not caused by the negligence of the tenant. *Callaghan v. Loughran*, 102 *id.* 476.

⁴ § 327 *ante*, n.; *Lewis v. Chisholm*, 68 Ga. 40; *Bosworth v. Thomas*, 67 *id.* 640; *Ocean S. Co. v. Hamilton*, 112 *id.* 901.

⁵ Code, Arts. 2663, 2664; *Viterbo v. Freidlander*, 120 U. S. 707, and see *Perrett v. Dupré*, 8 Rob. (La.) 52; *Shall v. Banks*, 8 *id.* 168; *Coleman v. Haight*, 14 La. Ann. 564.

§ 329. **Nor to rebuild in case the Premises are injured by Fire.** — If the premises become uninhabitable by reason of fire, and the landlord, having insured them, has recovered the insurance-money, the tenant cannot compel him, either at law or in equity, to expend the money so recovered in rebuilding, unless he has expressly engaged to do so,¹ [and the fact that the premises are so damaged as to be uninhabitable does not amount to an eviction.²] Nor will equity, under such circumstances, prevent the landlord from suing for the rent, until he shall have rebuilt the premises;³ for a tenant, unless there is an express agreement to the contrary, is obliged to continue to pay rent during the term, although the premises may become untenable for want of repairs, or from any other cause, or should be burned, in the meantime.⁴ [The destruction of premises which the lessor had covenanted to repair, does not discharge the rent.⁵] And it is held that if a landlord, being under no legal obligation to repair, should, after the lease has been entered into, promise so to do, his promise is without consideration, and no action can be predicated upon it.⁶ No implied covenant to rebuild or repair damages on the part of the landlord arises at common law from the exception of casualties by fire, tempest, or other cause, in the tenant's covenant to repair.⁷ [In the absence of a covenant to rebuild, the landlord has no right to enter upon the premises

¹ *Pindar v. Rutter*, 1 T. R. 312; *Carter v. Rockett*, 8 Paige, 437.

² *Hunnewell v. Bangs*, 161 Mass. 132.

³ *Leeds v. Cheetham*, 1 Sim. 146; *Belfour v. Weston*, 1 T. R. 310; *Holtzapffel v. Baker*, 18 Ves. 115. So in *Loft v. Dennis*, 1 Ellis & E. 474, where the insurers had the option to pay or rebuild, and elected to pay; and the tenant averred that he should have insured if there had not been this insurance on the premises; this was held no defence to an action for use and occupation.

⁴ *Moffatt v. Smith*, 4 N. Y. 126.

⁵ *Leavitt v. Fletcher*, 10 Allen, 121. There is no implied condition that the tenant may quit if the repairs are not done. *Surplice v. Farnsworth*, 7 M. & G. 576; *Sutton v. Temple*, 12 M. & W. 52. See § 330, *post*.

⁶ *Proctor v. Keith*, 12 Ky. 252; *Libbey v. Tolford*, 48 Me. 316; *Gottsberger v. Radway*, 2 Hilt. 342; *Speckles v. Sax*, 1 E. D. Smith, 258.

⁷ *Weigall v. Waters*, 6 T. R. 488. So, not by his covenant for tenant's quiet enjoyment. *Brown v. Quilter*, Amb. 619; *Withey v. Matthews*, 52 N. Y. 512.

and take possession, to the exclusion of the tenant, for the purpose of rebuilding. But if the tenant makes no objection, it will be deemed a license from him to the landlord to re-enter for such purpose; and when the new structure is completed, the tenant has the right to enter into possession thereof and retain it for the term.^{1]}

§ 330. **Landlord's Obligations under.—Tenant's Damages for Breach. — Right to abandon.** — When a landlord expressly covenants to repair, the obligation will be enforced only after he has been duly notified [by the tenant] of the want of repair,² [and he is entitled to a reasonable time in which to repair.³] He will not be excused from performance by proof of the lessee's negligence in the use of the premises. His obligation extends to the rebuilding of the premises in case of their destruction by fire, and to the keeping of the house tight, and the floors in good condition, if they were so originally constructed and the tenant's business requires it.⁴ A general covenant to repair, when made by the lessor, requires him not only to keep the premises in good repair, but to put them in that condition, although the tenant may have entered.⁵ [The repairs must be suitable to the tenant's condition in life.⁶ The covenant implies a license to the lessor to enter to repair.⁷ The entry of the landlord to repair for the benefit of the tenant is not an eviction,⁸ and when he enters for that purpose, he is not liable in damages for interrupting the

¹ *Smith v. Kerr*, 108 N. Y. 31.

² *Makin v. Wilkinson*, L. R. 6 Exch. 25; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; *Cooke v. England*, 27 Md. 14; *Wolcott v. Sullivan*, 6 Paige, 117; *Ploen v. Staff*, 9 Mo. App. 309.

³ *Walker v. Gilbert*, 2 Rob. (N. Y.) 214; *Seiber v. Blanc*, 76 Cal. 173. If the lessor neglects to repair, the tenant may either repair, and charge the landlord, or may sue for the damages from non-repair. *Hexter v. Knox*, 63 N. Y. 561.

⁴ *Flynn v. Trask*, 11 Allen, 550; *Leavitt v. Fletcher*, 10 *id.* 110. But a covenant to build does not bind the lessor to rebuild when the premises are destroyed by fire. *Gowell v. Lumley*, 39 Cal. 151.

⁵ *Wait v. Kelsey*, 38 N. Y. 180.

⁶ *Cohen v. Hebenicht*, 14 Rich. Eq.

⁷ *Saner v. Bilton*, 7 Ch. D. 815.

⁸ *Peterson v. Edmonson*, 5 Harr. 378.

business of the lessee or otherwise in the exercise of such right, unless it appears to have been done in a wanton, unskilful, or negligent manner.¹] If the landlord neglects to make suitable repairs, after being thereunto required by the tenant, the latter may, after waiting a reasonable time, make such repairs himself, and recover the expense from his landlord; or he may, at his option, leave the premises unrepaired and recover the damages he may have sustained from the landlord's default therein.² Upon a breach of this covenant, a tenant is entitled to remuneration for all expenditures of money, time, and labor in making the repairs, and to the damages sustained by his losing the use of the premises, while they are being placed in the condition in which the landlord should have kept them.³ [But though performance of

¹ *Turner v. McCarthy*, 4 E. D. Smith, 249.

² *Buck v. Rogers*, 39 Ind. 222; *Myers v. Burns*, 35 N. Y. 269; *Sparks v. Bassett*, 49 N. Y. S. C. 270. A covenant to keep the premises in repair was held to be broken by permitting the chimney-flues of a hotel to remain so foul that the rooms could not be used with a fire. *Ibid.* The covenant to keep a mill in repair was held to embrace an obligation to keep the tail-race, as well as the mill, in repair. But this, it was said, does not absolve the tenant from the ordinary care always required of millers in operating mills, such as cleaning the stones, adjusting the machinery, and cleaning the race of such deposits as arise from the ordinary use of a mill. Where the landlord has covenanted to *keep in repair*, while the tenant may sue during the term, he cannot recover damages for the whole term, but only the cost of repair at the time of suit. *Block v. Ebner*, 54 Ind. 544. A covenant "to keep in good repair and condition," "it being understood that said premises shall be in good repair before entry," was held to be, in effect, a covenant to put the premises in good repair before the beginning of the term. *McCullough v. Dobson*, 133 N. Y. 114. Where the lessor covenants to "keep the outside of the premises in good repair, provided that he shall not be liable for loss arising in said house by damage from the weather," the lessee covenanting "that he will keep the interior of the building in good repair, wear and tear excepted," the lessor is bound to put the premises in good repair, although they were in bad repair when the lease was given. *Miller v. McCardell*, 19 R. I. 305.

³ *Thomson-Houston Co. v. Durant L. I. Co.*, 144 N. Y. 34; *Long v. Geriet*, 57 Minn. 278; *Ladner v. Balsley*, 103 Iowa, 674; *Parker v. Meadows*, 86 Tenn. 181; *Spencer v. Hamilton*, 113 N. C. 49. And the tenant may recover a proportion of the rent for the time he was deprived of the beneficial use of the premises, while waiting for the repairs and

the lessor's covenant to put the premises in repair, in a lease to begin *in futuro*, is a condition precedent to the payment of the rent, the tenant waives such performance, or imperfect performance, by accepting and continuing in possession without objection.¹ While it is clear that breach of the covenant on the part of the landlord by failing to make repairs will not, ordinarily, furnish ground for the tenant to resist the payment of rent while he continues to occupy the premises,² yet it is held that if, for lack of such repairs, the premises are rendered useless for the purpose for which they were leased, as by failing to keep the flumes appurtenant to a mill in repair;³ such default on the part of the landlord may improvements to be made. *Biggs v. McCurley*, 76 Md. 409. If the tenant makes the repairs upon the landlord's failure to do so, upon notice, he may recoup the cost of the repairs in an action for the rent. *Cheuvront v. Bee*, 44 W. Va. 103; *Beardsley v. Morrison*, 18 Utah, 478. See § 374, *post*. A tenant is not bound to make permanent and important repairs which the landlord has contracted to make, but may recover his damages. *Thomson-Houston Co. v. Durant L. I. Co.*, *supra*. It is held that the loss of custom is too speculative to constitute an element of damage, *Middlekauff v. Smith*, 1 Md. 329; *Myers v. Burns*, *supra*; and that the agreement to repair does not contemplate damages resulting from destruction of life or injury to property caused by the omission to repair. *Arnold v. Clark*, 45 N. Y. S. C. 252; see *Hines v. Willcox*, 96 Tenn. 148. If the owner of a building is bound to repair, he is not relieved from his liability for injuries caused by defects in the building, or by the falling of snow and ice therefrom. *Kirby v. Boylston Market Ass'n*, 14 Gray, 249. In an action for a breach of this covenant, the tenant cannot recover for rent lost by his under-tenant's leaving the premises in consequence of their condition, unless especially averred. *Oettinger v. Levy*, 4 E. D. Smith, 288. But it is held that the tenant may recover damages, although, with the landlord's assent, he has sublet for the rent agreed on in the lease. *Watson v. Hooten*, 4 Bradw. (Ill.) 294.

¹ *Williamson v. Miller*, 55 Iowa, 86; *Kiernan v. Germain*, 61 Miss. 498; *Chadwick v. Woodward*, 13 Abb. N. C. 441. In a lease of a mill the lessor covenanted to put in a water wheel of not less than fifty horse power "if required by the lessee." It was held that the lessee had the right to continue in possession and pay rent and hold the lessor for the damages resulting from failure to perform the covenant, if he did not acquiesce in or accept the wheel put in, as a performance. *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270.

² *Young v. Burhans*, 80 Wis. 438; *Allen v. Culver*, 8 Den. 284; *Nichols v. Dusenbury*, 2 N. Y. 288.

³ *Bostwick v. Losey*, 67 Mich. 554.

amount to an eviction and the tenant will be justified in abandoning the premises and refusing to pay rent for the unexpired term.^{1]}

§ 331. **Obligations of the Parties under Covenant to rebuild.** — If the landlord agrees to rebuild in case the premises shall be burned, he is only bound to restore the premises to the same condition in which they were before he let them, and is not required to rebuild such additions as the tenant may have made himself. A tenant in such case is bound to continue the payment of rent while the premises are rebuilding, provided there is no unnecessary or unreasonable delay on the part of the landlord to rebuild after he had been notified of the destruction of the premises.² And if he quits the premises and sends the key to the landlord, who then proceeds to repair, there will be no abatement of the rent during the time that the landlord is, with reasonable diligence, making the repairs.³ The landlord's covenant to repair and the tenant's to pay rent are independent covenants, and at common law a breach of the former is no defence to an action on the latter.⁴

¹ *Leonard v. Armstrong*, 73 Mich. 577; *Bostwick v. Losey*, *supra*; *Pierce v. Joldersma*, 91 Mich. 463. See §§ 308–309 *a, ante*, 331, *post*, n. But it was held that the failure of the lessor to paint the house leased, to inclose the premises with a new fencing, and to make other repairs stipulated for in the lease, did not constitute such an eviction as would entitle the lessee to recover in an action for the breach of covenant, the expenses incurred by him in vacating the property and moving elsewhere. *Biggs v. McCurley*, 76 Md. 409.

² *Loader v. Kemp*, 2 C. & P. 375.

³ *Livermore v. Eddy*, 33 Mo. 547; *Kellenberger v. Foresman*, 18 Ind. 475.

⁴ *Belfour v. Weston*, 1 T. R. 310; *Hare v. Groves*, 3 Anst. 607; *Surplice v. Farnsworth*, 7 M. & G. 576; *Watson v. Coffin*, 11 Johns. 495; *Leavitt v. Fletcher*, 10 Allen, 110; *Speckles v. Sax*, 1 E. D. Smith, 253; *Hill v. Bishop*, 2 Ala. 320; *Tibbitts v. Percy*, 24 Barb. 39; *Wright v. Lattin*, 38 Ill. 293. It has been said that, where the premises are destroyed, and the landlord fails to rebuild according to his covenant, it is an eviction, and the tenant may abandon the premises and resist payment of rent. *Gates v. Green*, 4 Paige, 355, 358; *Womack v. M'Quarrie*, 28 Ind. 103; *Gibson v. Perry*, 29 Mo. 245; and Michigan cases cited § 330, *ante*, n. But the civil-law doctrine which exempted the tenant from rent on destruction of his premises is expressly denied to have been adopted

[But where the lessor covenanted to rebuild forthwith in case of the destruction of the building by fire, and if he should fail to do so within six months, that the lease should terminate at the lessee's election, it was held that the lessee's remedy under the lease was not limited to a termination of the lease as specified, and that he was not required to notify the defendant of his election; that his remedy was complete upon failure to rebuild, and that the fact that he did not pay, or offer to pay, rent after the fire did not show a surrender of his claim, or suspend his right of action against the lessor upon the covenant.¹] And it is now very generally held that the landlord's failure to repair, though not an eviction, may avail the tenant by way of counter-claim or recoupment, and as well when the action is for rent as when it is for use and occupation.² As this is a covenant running with the land, it is one of which an assignee of the term or an under-tenant may have the benefit; and it is also obligatory upon a grantee of the reversion.³

SECTION V.

THE COVENANT TO RENEW THE LEASE.

§ 332. *Defined.* — *Tenant's Option to renew.* — *Good-will.* — Another covenant, sometimes inserted in a lease on the part of a landlord, is that he will renew the lease at the expiration of the term, for the same or some other period mentioned.

into the common law. In some of the above cases, this statement was *obiter*, the tenant in each instance being held for the rent, on an express covenant. On principle the tenant remains liable, because the soil remains his during the term. Of course, where he has no interest in the soil, but is tenant of a room or story only, his liability ceases when his tenement is destroyed. See § 520, *post*. Or if the repairs are to be done before the tenant enters, this may be a condition precedent, and he may be excused from rent if he does not take possession. *Barnes v. Strohecker*, 21 Ga. 430. And he does not waive this defence by entering before the day: *ibid.*; *aliter* if he remains in under the lease: *Wright v. Lattin*, *supra*; *Lunn v. Gage*, 37 Ill. 19.

¹ *Ganson v. Tift*, 71 N. Y. 48.

² See § 374, *post*.

³ *Demarest v. Willard*, 8 Cow. 206; *Allen v. Culver*, 3 Den. 284.

[A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew; to include which would make the lease perpetual.¹ The right of renewal constitutes a part of the tenant's interest in the land, and, in the absence of a covenant to the contrary, may be sold and assigned by him, and the benefits of this right may be enforced by the assignee.² Although it is held that an additional term, granted under the covenant to renew, is not a new demise but an extension of the original³ term, yet under the ordinary form of lease there is a distinction between a stipulation to renew the lease for an additional term and a stipulation to extend it for an additional term, since the former requires the making of a new lease and the latter does not.⁴] If the terms of the covenant are express the performance of it will be enforced in equity.⁵ Sometimes, instead of a cove-

¹ *Kollock v. Scribner*, 98 Wis. 104 (overruling *Laird v. Boyle*, 2 *id.* 431); and see *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Hart v. Hart*, 22 Barb. 606; *Cunningham v. Pattee*, 99 Mass. 248; *Ranlet v. Cook*, 44 N. H. 512; *Pierce v. Grice*, 92 Va. 763; § 333, *post.* If a lease for years provides that it shall be renewable, or that the lessor shall pay for the improvements, the renewal for one term satisfies the contract to pay for the improvements, and, at the expiration of the second term, the lessor is entitled to recover the premises and the improvements. *King v. Wilson*, 98 Va. 259.

² *McClintock v. Joyner*, 77 Miss. 678.

³ *House v. Burr*, 24 Barb. 525; *Brown v. Parsons*, 22 Mich. 24; *Newhoff v. Mayo*, 48 N. J. Eq. 619.

⁴ *Tilleney v. Knoblauch*, 73 Minn. 108; *Ortan v. Noonan*, 27 Wis. 272.

⁵ *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Pritchard v. Ovey*, 1 Jac. & W. 396; *Rees v. Dacre*, cited 9 Ves. 332; *Tritton v. Foote*, 2 Bro. Ch. 636; *Furnival v. Crew*, 3 Atk. 83; *Worthington v. Lee*, 61 Md. 530. It is held that performance may be enforced, although the lessee has allowed the term to expire without applying for renewal, since time is not of the essence of the contract. *Myers v. Silljacks*, 58 *id.* 319. A promise by letter to renew a lease, in consideration of money already laid out by the tenant, is *nudum pactum*, and specific performance will not be decreed, although the money was laid out afterwards. *Robertson v. St. John*, 2 Bro. C. C. 140. The right of renewal may be waived, as by the lessee's going into an arbitration to determine the value of his improvements, the lease providing for a renewal or payment for the lessee's

nant for a renewal, it is agreed that the tenant may have the privilege, or option, of a further term.¹ In this case, if notice is stipulated for, it must be given,² [but the acts of the parties may operate as a waiver of notice. Thus where the lease provided for a further term at an increased rent upon the tenant's giving thirty days' notice, and the tenant, without giving such notice, continued to occupy after the expiration of the term and paid the increased rent to the lessor; it was held that there was a waiver of the express notice and that the lessee was entitled to hold for the additional term.³] And where no notice is stipulated for, the tenant's mere continuance in possession and paying rent, without express notice of his desire for the further term, entitles and binds him thereto.⁴

improvements, at the lessor's option. *Crosby v. Moses*, 48 N. Y. S. C. 146.

¹ See *Sutherland v. Goodnow*, 108 Ill. 528. When the covenant is binding on the lessor only, as that the lessor "shall and will at the expiration of the term" grant a new lease, the lessee is not bound to accept the renewal. *Bruce v. Fulton Nat. Bk.*, 79 N. Y. 154.

² *House v. Burr*, 24 Barb. 525; *Cooper v. Joy*, 105 Mich. 374. Where several parties are joint lessees for a term of years, with the privilege of continuing the lease for a like term upon giving notice prior to the end of the term, one of the lessees has not power to extend the lease by giving the required notice without the concurrence of the others. *Howell v. Behler*, 41 W. Va. 610. Where the lease provides for a written notice in order to a renewal, the estate terminates in default of notice at the end of the term, and an additional estate cannot be created by oral agreement or waiver of the stipulation as to notice for a term longer than that within which an oral letting for years is valid under the Statute of Frauds. *Beller v. Robinson*, 50 Mich. 264. In *Bradford v. Patten*, 108 Mass. 153, the widow's remaining in for a year, and administrator's paying rent during that time, was held not ground to presume that notice had been given.

³ *Stone v. St. Louis Stamping Co.*, 155 Mass. 267; and see *Kramer v. Cook*, 7 Gray, 550; *Willoughby v. Atkinson Co.*, 93 Me. 185.

⁴ *Clarke v. Merrill*, 51 N. H. 415; *Kramer v. Cook*, 7 Gray, 550; *Kimball v. Cross*, 136 Mass. 300; *Delashman v. Berry*, 20 Mich. 292 (see *Cooper v. Joy*, 105 *id.* 374); *Darling v. Hoban*, 53 *id.* 599; *Ins. Co. v. Nat. Bk. of Missouri*, 71 Mo. 58. So *Levitzky v. Canning*, 33 Cal. 299, though it does not appear how the election was exercised. The tenant may show that he held over under a special agreement with the lessor; for the holding over creates a presumption that the tenant has exercised his option to renew. *Atlantic Nat. Bk. v. Demmon*, 139 Mass. 420; see

If, however, the covenant be to renew within the term at the request of the lessee, without naming his executors, and the lessee dies, the executors are entitled to the renewal, if they apply within the term.¹ A covenant that the lessee shall have the refusal of the premises at the expiration of the lease, for a specified term, is a covenant to renew the lease at the same rent for that term. It is violated by a refusal to renew the lease, except at an increased rent. And the acceptance by the lessee of a new lease at the increased rent, after such a violation, at the same time protesting against a right to exact the increased rent, and claiming to reserve his right of action for the breach of the covenant; will not prevent him from recovering, as damages for the lessor's breach of his covenant, the difference between what the tenant was to have paid and what he was compelled to pay. The lessee in such case is not obliged to wait until the termination of the lease before he makes his election to have the lease renewed; for the lessor is bound to renew when the lessee makes his election and

Barnett v. Feary, 101 Ind. 95. In *West Tr. Co. v. Lansing*, 49 N. Y. 499, the option was held void for uncertainty. So *Whetstone v. Davis*, 34 Ind. 510; and see § 333, *post*. But in *Holley v. Young*, 66 Me. 520, though the tenant's privilege was to occupy "as long as he wished," this was held valid; and evidenced by his remaining after his term; and determinable only by tenant. So *Sweetser v. McKenney*, 65 Me. 225. In *Fuller v. Giles*, 29 Ind. 114, where the option was for one, two, or three years, it was held that remaining would establish the election for one year, but it needed express notice for the further term. And so, *Williams v. Mershon*, 57 N. J. L. 242. In *Thiebaud v. Bk. Vevay*, 42 Ind. 212, the rule in the text is denied. But the weight of authority sustains the rule that the tenant's holding over must be referred to a rightful holding under the privilege, rather than to a wrongful one as tenant at sufferance. And see *Montgomery v. Commissioners*, 76 Ind. 362 (where *Thiebaud v. Bk. Vevay*, *supra*, is distinguished); and *Terstegge v. First German, &c. Soc.*, 92 Ind. 82.

¹ *Hyde v. Skinner*, 2 P. Wms. 196; *Chapman v. Dalton*, 1 Plowd. 286. With some lessors, it is usual to grant a new lease to the tenant in possession, at the end of the term; from which fact many tenants claim a right of renewal. But, independent of some positive local custom, this is a right that cannot be enforced at law or in equity. The so-called tenant-right of renewal confers no positive interest, either vested or contingent, and is a mere naked possibility, depending solely on the caprice of the lessor.

demands renewal.¹ And a tenant under these circumstances would have a right to hold over at the original rent until the renewal rent is fixed according to the terms of the contract, and a lease tendered.² [So a lessee, at the expiration of a term under a lease containing a covenant by the lessor that at such expiration the lessee shall be paid the appraised value of the building or a new lease granted at an appraised rental, is entitled to retain the possession until the covenant shall be performed by the lessor; and he is liable for no more than the rent originally reserved while thus continuing in possession.³] As the covenant runs with the land, a purchaser of the estate will be bound by it, and the lessee's assignee may avail himself of it.⁴ [It is to be observed that the good-will of a lease, that is, the reasonable expectation of its renewal by the landlord, is an interest which equity will protect. Hence, a transfer of the good-will embraced in an assignment of the lease for value, is an essential part of the agreement of the parties, and necessarily implies that no act shall be done by the lessee to deprive his assignee of the benefit which the transfer was meant to secure to him. And if a lessee, after such a transfer and before the expiration of the term, secretly obtains from the landlord a renewal of the lease to himself, he violates, if not the letter, the intent of his contract. Such an act is a breach of good faith; and equity will not suffer him to hold an advantage so obtained, but will compel him to assign it.⁵]

¹ *Tracy v. Albany Exch. Co.*, 7 N. Y. 472; *Driggs v. Dwight*, 17 Wend. 71; *Crawford v. Kastner*, 63 How. Pr. 90; *Sutherland v. Goodnow*, 108 Ill. 528; *McAdoo v. Callum*, 86 N. C. 419. And where notice is required, it has been held that the lessee is not merely entitled, but bound, to notify the lessor before the expiration of the first term of his election to have a renewal. *Renoud v. Daskam*, 34 Conn. 512. See *Stephens v. Reynolds*, 6 N. Y. 454; § 74, *ante*.

² *Ryder v. Jenny*, 2 Rob. 56.

³ *Van Beuren v. Wotherspoon*, 164 N. Y. 368; and see *Holsman v. Abrams*, 2 Duer, 435; *Ryder v. Jenny*, *supra*; *Paine v. Rector, & Co.*, 7 Hun, 91; *Van Rensselaer v. Penniman*, 6 Wend. 569; § 533, *post*.

⁴ *Piggot v. Mason*, 1 Paige, 412; *Barclay v. Steamb. Co.*, 6 Phila. 558; *Richardson v. Sydenham*, 2 Vern. 447; *Brook v. Bulkeley*, 2 Ves. Sr. 498; *Leppla v. Mackey*, 31 Minn. 75.

⁵ *Bennett v. Vansyckel*, 4 Duer, 462.

§ 333. **When Void for Uncertainty.**—A covenant “to let” the premises to the lessee at the expiration of the term without mentioning the price for which they are to be let; or to renew the lease on such terms as may be agreed upon; or, as is held by some courts, for such further time as lessee shall elect; or to renew upon the basis of a valuation of the premises as at the end of the lease, without any provision for determining that valuation; does not amount to a covenant for renewal but is void for uncertainty.¹ Nor will a general covenant “for renewal” be construed to imply a perpetual renewal; the most a lessor is bound to give on such a covenant is a renewal for one term only.² A covenant to renew a lease “under the same covenants contained in the original lease” is satisfied by a renewal of the original lease for another term, omitting the covenant to renew; for if the continued grant of successive leases and not a single renewal only had been intended, words would naturally have been used, indicating such an intention. A different construction would virtually lead to a grant in perpetuity; and where no consideration appears for a grant of so extensive a nature, such cannot be a reasonable construction.³ [So where a lease contained a covenant for a

¹ *Abeel v. Radcliffe*, 13 Johns. 297; *Laird v. Boyle*, 2 Wis. 481; *Pray v. Clark*, 113 Mass. 283; *West. Tr. Co. v. Lansing*, 49 N. Y. 499. And if the tenant remains in, a tenancy from year to year will be created. *Ibid.* In *Whetstone v. Davis*, 34 Ind. 510, where there was a further term of two years at tenant's option, but with the proviso, “if the farm was for rent, and the tenant suited the landlord, and they agreed on the rent,” such proviso was held void.

² *Whitlock v. Duffield*, Hoffm. Ch. 110; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Cunningham v. Pattee*, 99 Mass. 248; *Moore v. Foley*, 6 Ves. 237; *Taylor v. Stibbert*, 2 *id.* 443; *Richardson v. Sydenham*, 2 Vern. 447; *Iggulden v. May*, 9 Ves. 425; s. c. 7 East, 237. But a covenant to “renew and to continue to renew” is a covenant for a perpetual renewal. *Page v. Esty*, 54 Me. 319.

³ *Carr v. Ellison*, 20 Wend. 178; *Richardson v. Sydenham*, 2 Vern. 447; *Tritton v. Foote*, 2 Bro. Ch. 636; *Tracy v. Albany Exch. Co.*, 7 N. Y. 472; *Brend v. Frumveller*, 82 Mich. 215. A lease giving the lessee the privilege of additional years “if desired,” on notice to be given one month before a time specified, continues on such notice being given for the additional term upon all the covenants and agreements of the former lease without the execution of any new lease. *House v. Burr*, 24 Barb. 525.

new lease at the expiration of the term, to contain "a like covenant for future renewals . . . as is contained in the present indenture," and a second lease was given with a covenant for a single renewal, and upon its expiration, a third, without any covenant for renewal, it was held, in an action to reform the two latter leases by inserting covenants which would secure the lessee a further term, that the lessee was not entitled to relief, since the construction of the first lease contended for by the lessee would tend to create a perpetuity.¹]

§ 334. **To be reasonably construed.** — A covenant to renew, in general terms, without specifying the particular period for which the renewal is to be made, as to grant such further lease as the lessee or his executors shall desire; must receive a reasonable construction.² If it is simply to renew at a specified rent, it carries none of the covenants of the old lease with it.³ It was held, in an English case, that a cove-

¹ *Syms v. Mayor*, 105 N. Y. 658. See § 332, *ante*; *Perry v. Lime Co.*, 94 Me. 325; *Darling v. Hoban*, 53 Mich. 599. Under certain circumstances, a covenant for perpetual renewal may not be unreasonable; but the intention should be expressed without ambiguity. It is said to be better, for avoiding fraud, to suffer a party to escape from a contract which he may have intended to make, than to enforce it upon a conjecture of the intent of the parties. See *Iggulden v. May*, 9 Ves. 425; *Willan v. Willan*, 16 *id.* 84; *Baynham v. Guy's Hosp.*, 3 *id.* 298; *Kirkham v. Chadwick*, 13 *id.* 549; *Harnett v. Yeilding*, 2 Sch. & L. 558; *Creighton v. McKie*, 2 Brewst. 383. The fair construction of a lease for one year from a given date, with the privilege of longer lease, if both parties agree, reserving the right to sell part or all, is that the lease terminates upon a sale of the premises, or, if of a portion of them, as to the part sold. *Wallace v. Bahlhorn*, 68 Mich. 87.

² Thus in England on a farming lease for five years, twenty-one years was held a reasonable period of renewal, because such was the usual period of terms. *Hyde v. Skinner*, 2 P. Wms. 196. "The meaning of this covenant was that the lessee might be reimbursed the money he had laid out in improvements. But . . . he can only have a renewal for the usual term of twenty-one years. And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewal of a new lease, forasmuch as then the lease would never end." In America, as there is no usual period for leases, the renewal would be for a term equal to the original term.

³ *Willis v. Aston*, 4 Edw. 504; *Ryder v. Jenny*, 2 Rob. 256.

nant to renew from time to time, and to perfect, at the charge of the lessee, such other further assurance as the lessee should require, at such rents and under such covenants as were contained in the lease, was to be construed as a covenant for further assurance, and not for perpetual renewal.¹ But where a lease contained a covenant that the lessor would always, at any time when requested by the lessee, demise the premises for a further term of thirty-one years, and that the new leases were to contain the same rents, covenants, articles, clauses, provisos, and agreements, as the original lease; it was held that this amounted to a covenant for perpetual renewal.² [It is held that a lease for a certain term, "with the privilege of four years more . . . by giving ninety days' notice" before the expiration of the original term, is an unconditional lease for the first period and a conditional lease for the further period; and that, if the notice is given the lessee holds for the additional term under the original lease and not under the notice. The notice is therefore not within the Statute of Frauds and may be given by an agent not having written authority.³]

¹ *Brown v. Tighe*, 8 Bligh, n. s. 272.

² *Copper Min. Co. v. Beach*, 18 Beav. 478; *Blackmore v. Boardman*, 28 Mo. 420; *Page v. Esty*, 54 Me. 219; *Boyle v. Peab. H. Co.*, 46 Md. 623. And equity will enforce this right. *Ibid.*; *Banks v. Haskie*, 45 *id.* 207.

³ *Sheppard v. Rosenkrans*, 109 Wis. 58. Where a lease of land by the owner thereof to the owner of the buildings thereon, so far as it relates to the subject of renewal, contains mutual covenants for an appraisal and a separate covenant by the lessor that if he does not elect to pay for the building he will grant a renewal, without any provision concerning the acceptance, by the lessee, of a renewal, but with an absolute covenant by him to surrender possession at the end of the term, a covenant by the lessee to accept, corresponding to the lessor's covenant to grant a renewal, will not be implied; and, hence, on the lessor's electing not to take the building, but to renew, the lessee cannot be compelled to accept and execute the renewal lease, unless he elects so to do. An election by the lessee to accept the renewal lease, after having expressly refused it when tendered, is not constituted by his remaining in possession after an appraisal, and the expiration of the term, under a claim, asserted promptly and in good faith, that the rent had not been fixed by a valid appraisal. *Zorkowski v. Astor*, 156 N. Y. 398. Where a lease for twelve years provided that the lessee might make improvements thereon, and at the end of his term the lessor

§ 335. **In the Alternative with other Covenants. — Effect of. — Appraisement of Improvements.** — Sometimes this covenant is in the alternative, either to renew or to pay the appraised value of the buildings to be erected by the lessee during his term; the appraisement in such case being, in effect, an arbitration, and so final between the parties and their personal representatives.¹ The valuation is to be made as of the time of the expiration of the lease;² and if the lessor refuses to appoint an arbitrator, the lessee cannot have an *ex parte* appraisement made, but must resort to his action on the covenant, and have his damages ascertained by a jury.³ And where, in a building leased for twenty-one years, at an annual rent, it was covenanted that, at the expiration of the term, the buildings to be erected and the improvements to be made by the lessee during the term, should be valued in the manner specified in the lease, and if the lessor should not pay the amount of such valuation, he should renew the lease or

would either buy the improvements or extend the lease, the lessor cannot, by an extension of the lease for one day after the close of the original term, defeat the right of the lessee to a substantial extension of the lease or to have his improvements purchased as provided for by the lease. *Phillips v. Reynolds*, 20 Wash. 374. A holding over by one of several partners under a lease made to the partnership, the other partners retiring, does not of itself renew or continue the tenancy after the expiration of the original term, so as to entitle the party so in possession to the benefit of a covenant for renewal. *Buchanan v. Whitman*, 151 N. Y. 253.

¹ *Van Cortland v. Underhill*, 17 Johns. 405; *Holliday v. Marshall*, 7 *id.* 211; *Renwick v. Renwick*, 1 Bradf. 234; *Crosby v. Moses*, 48 N. Y. S. C. 146.

² *Berry v. Van Winkle*, 2 N. J. Eq. 390; *Speilmann v. Kliest*, 36 *id.* 199. Where a lessee being notified that the lessor has appointed an arbitrator under a covenant for a renewal, and, being required to appoint one on his own behalf before the expiration of the lease, fails to do so, he, at the option of the lessor, waives his right to renewal; and if afterwards the lessor requires him to pay a specific rent, and he holds over, this may be regarded as a new letting from year to year and not a renewal; and the tenant may, in such case, be dispossessed by summary proceedings on non-payment of rent.

³ *Berry v. Van Winkle*, *supra*; *Holliday v. Marshall*, *supra*; and see *Whitlock v. Duffield*, Hoff. Ch. 110. If the lease is silent as to when the arbitrators are to be appointed, it means they shall be appointed a reasonable time before its expiration. *Wells v. DeLeyer*, 1 Daly, 39.

redemise the lot at such rent and upon such terms as might be agreed upon between the parties; and at the end of the term, the lessee refused to accept a redemise of the lot upon any terms, and insisted upon being paid for his buildings and improvements, according to a valuation thereof made pursuant to the covenant in the lease; but the lessor tendered a renewal of the lease, for the same term and at the same rent, without any covenants as to buildings, or as to paying for buildings or improvements; it was held that the lessee was bound to accept a renewal of the lease as tendered, or give up his claim to be paid for the buildings or improvements.¹ [Where the agreement was for an appraisal, and purchase by lessor in case of renewal, it was held that the covenant included the case of a failure to renew because the lessor would not agree upon any rental.² The lessor covenanted that if the lessee should erect a dwelling-house, corresponding in height with another house on the demised premises, he would, at the termination of the lease, pay for the building so erected, at a valuation to be made by appraisers. The tenant erected a building which did not correspond in height with the house referred to, and was not finished as a dwelling-house, although it was capable of being turned into one at little expense; the lessor made no objection, although he had knowledge of the character of the building and did not intimate that a question would be raised as to the lessee's right to be paid for the building as it stood. It was held that in the absence of fraud, or a waiver on the part of the lessor, inducing the lessee to depart from the terms of the covenant, the lessee could not recover the value of the building.³ Where the stipulation is that the lessor, at the end of the term, will renew the lease or pay for the buildings erected by the tenant, and at the end of the term he tenders a renewal, which the tenant refuses to accept, the landlord is entitled to recover possession without paying for the buildings.⁴ Where there was a fair effort on the part

¹ *Rutgers v. Hunter*, 6 Johns. Ch. 215.

² *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 180.

³ *Pike v. Butler*, 4 N. Y. 360.

⁴ *Pearce v. Colden*, 8 Barb. 522.

of the assignee of the lessee to have the improvements appraised, and they were in fact valued before the expiration of the term; and the heirs had received the benefit of the improvements in the enhanced value of the property; it was held that the time of the stipulated appraisal was not so far essential as to destroy the claim for the value of the improvements.¹ Where a lease provided that the lessor should not take possession until he had given thirty days' notice, and paid the value of the improvements made by the lessee, the value to be ascertained by two appraisers, each party to appoint one; it was held that the lessor was entitled to possession after he had given the notice and tendered the value of the improvements; the lessee having refused to appoint an appraiser.²] If the tenant claims a renewal by force of a long-continued custom to renew, independent of any covenant, the mere fact of his having expended money in improvements will not give him a right to demand such renewal. There must be some covenant or agreement, express or implied, relative to the improvements, by which the landlord has encouraged him to proceed. Equity may then consider that the tenant shall have the benefit of his expenditure, and prevent the landlord from putting an end to the tenancy.³ [But it is to be observed that

¹ *Renwick v. Renwick*, 1 Bradf. 234.

² *Conner v. Jones*, 28 Cal. 59.

³ *Pilling v. Armitage*, 12 Ves. 78. In *Robertson v. St. John*, 2 Bro. C. C. 140, Lord Thurlow held that a promise by the landlord to renew a lease, in consequence of money already laid out by the tenant, was *nudum pactum*; although had the promise to renew been founded upon the expenditure, as a consideration, the tenant might have enforced a specific performance. See 1 Eq. Cas. Abr. 19. A covenant to pay at the end of the term for all the buildings and improvements that may be made on the land means to pay for such as are on the land at the end of the term. *Van Rensselaer v. Penniman*, 6 Wend. 569. An agreement to pay for all buildings and improvements to be erected by the lessee does not mean payment for ordinary repairs. *Lametti v. Anderson*, 6 Cow. 302. Where a lessor covenanted to renew or "to pay the value of such buildings as should be erected in pursuance of the lease," and by the terms of the lease the lessee was to make the buildings fire-proof within two years, which he failed to do; it was held that the covenant to pay could not be enforced. *Fisher v. Fisher*, 1 Bradf. 335. Although equity cannot specifically

the law, in the United States, does not recognize any so-called "tenant right of renewal."¹ The covenant by the lessor to pay the appraised value of the lessee's improvements does not run with the land.²]

§ 335 *a*. **With Stipulation to convey to Tenant. — Tenant's Option. — Landlord's Promise to pay for Improvements. —** This covenant is sometimes varied by a stipulation to convey the premises to the lessee, at the end of the term, at a certain price, if the lessor shall decline to pay for the improvements at their appraised value. In such a case, it was held that the assignee of a moiety of the premises might compel a performance of the contract, either by a suit in the name of all, or, if the others refuse to sue, in his own name.³ But where a lessor covenanted that if the lessee should divide the premises into lots of certain dimensions, and the sublessees should erect buildings thereon of a certain description, then they should severally have the privilege of purchasing their lots at the end of the term,—it was held that the erection of a building partly on each lot, or buildings of an entirely different description on each, gave them no right to purchase.⁴ [The option to purchase gives the lessor a right to enforce a covenant to pay for the tenant's improvements at an appraisal to be made, yet where the landlords are trustees and not the original lessors, and refuse to renew, the court may decree payment from the trust fund. *Robinson v. Kettletas*, 4 Edw. 67.]

¹ §§ 22, 332, *ante*; *Emery v. Boston Terminal Co.*, 178 Mass. 172, criticising *Baltimore v. Rice*, 73 Md. 307. See § 336, *post*.

² *Watson v. Gardner*, 119 Ill. 312.

³ *Van Horne v. Crain*, 1 Paige, 455; *Ostrander v. Livingston*, 3 Barb. Ch. 416.

⁴ *Ostrander v. Livingston*, *supra*. A lessee of a house granted a sublease, in which he covenanted that if he should obtain an extension of the term, or a renewal, he would grant an extension or renewal of the sublease for the same period. A renewal of the lease was taken in the name of a trustee for the wife of the lessee for her separate use. Held, that the lessee was under no obligation to endeavor to procure the renewal to himself, and that the question was whether the trustee was in reality trustee for the lessee or for his wife; and that in the former case the parties to the record would be bound by the lessee's covenant, and the sublessee would be entitled to a renewal, but in the latter case not. *Lumley v. Timms*, 28 L. T. N. S. 608. If the several persons are inter-

see no estate in the premises, beyond his leasehold interest, until it is exercised,¹ and a tenant in possession, having failed to exercise his privilege within the time allowed by his lease, is liable for waste committed on the premises during his possession.² It is held, that an oral acceptance of an option contained in a lease is sufficient under the Statute of Frauds to bind the lessor, the lease being signed by the party by whom the sale is to be made.³ The payment of rent by the lessee, after the time at which the option is to be exercised, will, if unexplained, be equivalent to an abandonment of the option.⁴ Where the lease provided that the tenant might purchase at "the option of the parties" it was held that this meant at the option of the tenant.⁵] In respect of improvements made upon the leased premises by the tenant, during the term, in the absence of an agreement, the law imposes no obligation

ested in a lease about to expire, and one of them undertakes to procure a renewal, but takes it in his own name, it will enure for the benefit of all. *Burrell v. Bull*, 2 Sandf. Ch. 15.

¹ *Bras v. Sheffield*, 49 Kan. 702. But it is a vendible interest, see § 336, *post*.

² *Powell v. Dayton Railroad Co.*, 16 Or. 33.

³ *Smith v. Gibson*, 25 Neb. 511.

⁴ *Knowles v. Murphy*, 107 Cal. 107.

⁵ *Mack v. Dailey*, 67 Vt. 90. Where the lease of premises was renewed several times, and on the first renewal the lessee was given an option to purchase "to continue during the lease," it was held that the renewals effected a continued lease, at any time during which the lessee might exercise the option. *Schiels v. Horbach*, 28 Neb. 359. The lessor's agreement to sell after the lapse of fifteen years, and within the term, is not void for remoteness, as creating a future estate which may not vest within the time prescribed by law. It is not within the rule against perpetuities; nor does it create a foreign contingent remainder on a term of years, or a forbidden fee limited upon a fee. *Blakeman v. Miller*, 136 Cal. 138. A renewal of a lease containing an option to purchase recited that the lease was renewed "on the same terms and conditions" and that the option was to be exercised only on condition that the lessee would enter into a covenant, to be inserted in the deed, to erect a building on the premises to cost a certain sum. It was held, that this gave an option to purchase, independent of the question whether the option was *ipso facto* renewed by the mere renewal of the lease "on the same terms and conditions;" and, further, that the agreement was not so unconscionable that a court of equity would refuse to compel specific performance of it. *Madison Athletic Ass'n v. Brittin*, 60 N. J. Eq. 160.

upon a landlord to pay the tenant for these; the tenant's right extending no further than to allow him to remove them before the expiration of his term.¹ And if he voluntarily quits possession of the premises before the expiration of the term, although at the request of the landlord, or if the landlord re-enters during the term for the non-payment of rent, the contract between the parties is ended and the lessee loses the value of his improvements, notwithstanding there may have been a stipulation in the lease providing for their appraisal at the end of the term and the payment of their value.² [But the landlord may be liable for improvements made by the tenant before execution of the lease and possession, in consideration of the lease and with the owner's knowledge;³ and it is held that, generally, a special promise by the landlord may be implied to pay for the value of improvements put upon the premises by the tenant; and that such promise may be the subject of a counterclaim in an action for the rent.⁴ When there is a promise by the lessor to pay for the tenant's improvements, the tenant's right to payment does not depend upon his possession running the full term of the lease, but accrues whenever the lessor takes rightful possession.⁵]

§ 336. **Right of Renewal as a Distinct Interest. — Specific Performance.** — In the case of church leases, and leases from trustees of charities, where the lessors are in the practice of

¹ *Kutter v. Smith*, 2 Wall. 491; *Gay v. Joplin*, 4 McCrary, 459; *Wilkinson v. Farnham*, 81 Mo. 672; *Dun v. Bagby*, 88 N. C. 91; *Wilson v. Scruggs*, 7 Lea, 635.

² *Lawrence v. Knight*, 11 Cal. 208; *Gudgell v. Duval*, 4 J. J. Marsh. 229; and see *Smith v. Brown*, 5 Rich. Eq. 291. See *Schoellkopp v. Coatsworth*, 166 N. Y. 77. An entry under a license, and an occupation for more than fifteen years, give the party a right to be reimbursed for the value of his erections. *Pope v. Heeny*, 24 Vt. 560.

³ *Rice v. Culver*, 172 N. Y. 60, distinguishing *National Wall Paper Co. v. Sire*, 163 N. Y. 122.

⁴ *Gocio v. Day*, 51 Ark. 46.

⁵ *Schoellkopp v. Coatsworth*, *supra*. A notice that the landlord elects "pursuant to the provisions of said lease" sufficient; and payment for improvements not a condition precedent to the landlord's possession. *Matter of Coatsworth*, 160 N. Y. 114.

giving new leases to their tenants from time to time, upon the payment of a renewal fine or a reasonable addition to the rent, the tenant, as to third persons, has been held to possess a vendible interest in such imperfect right of renewal, which equity will recognize and protect, although such renewal depends upon the mere will of the lessors. And if one who has a particular or special interest in such a lease obtains a renewal of it, in consequence of his being in possession as tenant or from his having such special interest, the renewed lease is, in equity, to be considered as a continuance of the original lease, for the protection of the rights of parties having legal or equitable interests in the old lease.¹ And, therefore, where a complainant, as the lessee of premises part of which had been let by him to an under-tenant, contracted with the defendants to sell his interest in the premises to them, for the purpose of enabling them to obtain a renewal, without prejudice to the rights of the sublessee, and the defendants, in consequence of such agreement, obtained a new lease of the premises in their own names, and then evicted the sublessee, by which the complainant was compelled to make good the loss or damage sustained by him; it was held that the complainant was entitled to a specific performance of the agreement, and to be indemnified against the claim of the sublessee; and that he had a lien for the unpaid purchase-money upon the legal interest in the premises, which the defendants had acquired under their new lease.² [An option to renew, by covenant, goes to the assigns of the lessee, or to his personal representatives.³]

¹ *Mitchell v. Read*, 61 Barb. 310.

² *Phyfe v. Wardwell*, 5 Paige, 268; *Anderson v. Lemon*, 8 N. Y. 236. A mortgagee is entitled to similar protection. *Gibbes v. Jenkins*, 3 Sandf. Ch. 130. Where one of several joint tenants obtains a renewal to himself alone, it will enure to the benefit of all. *Burrell v. Bull*, 3 Sandf. Ch. 15; *James v. Dean*, 11 Ves. 383; s. c. 15 *id.* 236; *Featherstonhaugh v. Fenwick*, 17 *id.* 298; *Pickering v. Vowles*, 1 Bro. C. C. 197; *Mulvany v. Dillon*, 1 Ball & B. 409.

³ *Kolasky v. Michels*, 120 N. Y. 635. The assignee of a lease which provided for a fixed term with the privilege of extending it by giving written notice to the lessor, who enters into possession of the demised premises and continues therein after the term has expired without any

§ 337. **Specific Performance of Covenant, when decreed.** — Insolvency,¹ or the commission of a felony, on the part of the covenantee,² will generally prevent a decree for the specific performance of a covenant of renewal. Nor will performance be enforced where a tenant has committed waste, used the land in an unhusbandlike manner, or been guilty of a breach of covenant for which the lessor has a right of re-entry;³ nor in cases where the agreement to renew has been obtained by fraud or misrepresentation,⁴ or the tenant has already been guilty of wilful breaches of a covenant which was agreed to be inserted in the new lease.⁵ But a surrender and conveyance to the lessor of an under-lease, is no bar to a claim of the lessee or his assigns for a renewal of the original lease according to the covenant.⁶ And if a tenant assigns his contract to a third solvent party and afterwards becomes insolvent, the court will decree a specific performance against the landlord in favor of such third party.⁷ Injuries accruing to the landlord by the acts of a tenant, but which do not amount to a breach of covenant, form no ground for refusing a decree for the specific performance of the contract; therefore, where the tenant, under an agreement for a building-lease, had built claim of right so to do, except as authorized by the lease, and who pays the rent thereafter as it becomes due, impliedly elects to exercise the option for an extension of the term, although no express notice of such election is given; and the lessor by receiving the rent waives the requirement of a written notice and consents to such occupancy; the assignee, therefore, continues liable for the rent for the unexpired portion of the extended term, although before its expiration he assigns the lease and abandons the premises. *Probst v. Rochester Steam Laundry Co.*, 171 N. Y. 584.

¹ *Buckland v. Hall*, 8 Ves. 92; *Featherstonhaugh v. Fenwick*, *supra*; *De Minckwitz v. Udney*, 16 *id.* 466; *Hyde v. Skinner*, 2 P. Wms. 196; *O'Herlihy v. Hedges*, 1 Sch. & L. 123. See *Stacey v. Hill*, 1901, 1 K. B. 660; *Horseyst v. Steiger*, 1898, 2 Q. B. 259, 1899, 2 Q. B. 79.

² *Willingham v. Joyce*, 3 Ves. 169.

³ *Hill v. Barclay*, 18 Ves. 63; *Gourlay v. Duke of Somerset*, 1 Ves. & B. 68; *Lovat v. Ranelagh*, 3 *id.* 29; *Gannett v. Albree*, 103 Mass. 372.

⁴ *Pendred v. Griffith*, 1 Bro. P. C. 314; *Willingham v. Joyce*, *supra*.

⁵ *Hill v. Barclay*, 18 Ves. 63.

⁶ *Piggot v. Mason*, 1 Paige, 412.

⁷ *Crosbie v. Tooke*, 1 Mylne & K. 431; *Morgan v. Rhodes*, 1 Mont. & A. 214.

a brew-house which injured the value of the landlord's other property, there being no covenant in the lease against building a brew-house, the court decreed performance; saying that if the erection became a nuisance the defendant had a remedy at law.¹ And where the covenant to renew is independent, the fact that the lessee was in arrear to the lessor for rent upon another covenant contained in the lease, does not excuse its performance.²

§ 338. **Without Consideration, or Inequitable; Specific Performance of, refused.** — As every contract depends upon the consideration for its validity, it is necessary that there be a sufficient and reasonable consideration, on the part of the lessee, to support this covenant; and if an agreement for renewal be unequal, unjust, or inserted by mistake, specific performance will not be decreed. A bill was filed on a covenant for the renewal of a leasehold estate, of the yearly value of £130, at a fine of £3, by an addition of ten years; but as there was no adequacy of price for this renewable perpetuity, no onerous services on the part of the lessee, no money advanced, and no improvement made, the bargain was considered so hard that the bill was dismissed.³ So a voluntary agreement indorsed on a lease after its execution by one not a party to it, but only a remainder-man, will not bind him to the performance of a covenant for renewal, contained in such a lease.⁴ So a promise by letter to renew a lease, by reason of money having been expended on the premises, is void, as being founded upon a past consideration. Nor will the laying out of money afterwards, if it is voluntary, vary the case; but where the promise was founded on a previously expressed intention of spending money for a particular purpose, which was not objected to, specific performance was decreed.⁵

§ 339. **Lessee's Legal or Equitable Remedy.** — **Remedy barred by Laches.** — When a lessee is entitled to a renewal and the

¹ *Gorton v. Smart*, 1 Sim. & S. 66.

² *Tracy v. Albany Exch. Co.*, *supra*; 5 B. & A. 584.

³ *Redshaw v. Bedford Level*, 1 Eden, 346.

⁴ *Dowling v. Mill*, 1 Mad. 541.

⁵ *Robertson v. St. John*, 2 Bro. C. C. 140; *Richardson v. Sydenham*, *supra*.

landlord refuses to renew, the lessee has a right to elect whether he will proceed at law for damages, or in equity for specific performance.¹ [Where the lease provided for periodical renewals the rent for each period to be fixed by arbitrators, and the lessor fraudulently sought to evade his contract by refusing to appoint an arbitrator, and sued the lessee for use and occupation, it was held that equity would stay the lessor's suit, until the lessor should appoint an arbitrator; notwithstanding the doctrine that equity will not enforce a specific performance of an agreement to arbitrate.² Where a lease provided for the erection of a building on the premises by the lessee and for the lessor's election at the end of the term to renew, or buy the building, or to sell the premises at a price to be fixed by arbitration, and the lessor failed to elect, it was held that the lessee might then elect and have equitable relief to enforce his election.³] Generally, if the lessee is guilty of laches in demanding a renewal, equity will not aid him.⁴ Circumstances may excuse laches; but the lessor will not continue to be bound by his covenant, where the lessee has neglected to perform the conditions with which it was coupled. There would be no mutuality if it were left to the option of the lessee alone, to enforce the contract when he pleased, but to leave himself free as long as he found it convenient.⁵ [But mere delay, after completing an agreement for an extension, before legally enforcing it, though long continued, is not laches if the landlord is not thereby prejudiced.⁶ Where a lessee had a vested interest of large value in improvements made under a lease which gave him a right of renewal on his giving a specified notice, it was held that he might be relieved in

¹ *Arnot v. Alexander*, 44 Mo. 25.

² *Tscheider v. Biddle*, 4 Dill. 55.

³ *Coles v. Peck*, 96 Ind. 333.

⁴ *Eaton v. Lyon*, 3 Ves. 690; *McAlpine v. Swift*, 1 Ball & B. 285.

⁵ *London v. Mitford*, 14 Ves. 41. A lease for five years contained a covenant to renew for another five years, if it should be desired by the lessee; the court held that the lessee was bound to declare his election as to renewal before the expiration of the original term, and that having neglected to do so until two days afterwards, equity would not interfere for his relief. *Renoud v. Daskam*, 34 Conn. 516.

⁶ *Ryder v. Robinson*, 109 Mass. 67.

equity from his failure, by reason of mistake or accident, to give such notice in season, he not being guilty of laches.¹] Equity will interfere, beyond the stipulations of a covenant, only where literal performance has been prevented by unavoidable accident, fraud, surprise, or ignorance not wilful; and upon compensation being made, and no injury done to the lessor.² Accordingly, where an original lessee, under a demise with a covenant for renewal, died, and the instrument came to the possession of his executor, who was ignorant of the covenants contained in the lease or that his testator was one of the lives named therein, until apprised of it by his solicitor; it was held that such ignorance of the contents of the lease did not entitle the plaintiff to seek relief in equity or absolve him from the effect of omitting to apply for a renewal in time.³ So when the assignee of the lease did not know of the death of the *cestui que vie*, but accounted for his ignorance on the ground that the description in the lease, of the residence and trade of the person referred to, did not correspond with his actual residence and trade at the time of his decease; and, therefore, though the owner of the lease knew of the death of this person, he was mistaken as to his identity, and immediately upon his receiving information on the subject applied for a renewal; it was held that these circumstances did not entitle the plaintiff to relief in equity; since the lessee was bound to inform himself correctly as to the lives; and to apply within the prescribed period.⁴ But in general, a renewal will be ordered where there has been a substantial performance of the condition upon which the renewal was to be granted, and no injury has been done to the other party.⁵

¹ N. Y. Life Ins. & T. Co. v. Rector, 12 Abb. N. C. 50.

² Eaton v. Lyon, *supra*; Baynham v. Guy's Hosp., 3 Ves. 295; Rawstorne v. Bentley, 4 Bro. C. C. 415; but see Maxwell v. Ward, 11 Price, 16, the opinion of Lord C. B. Richards.

³ Maxwell v. Ward, 13 Price, 676.

⁴ Harris v. Bryant, Rolls, 10 Dec. 1827, cited Platt on Covenants, 263.

⁵ Reed v. St. John, 2 Daly, 213. Where the lessor covenanted to renew on lessee's paying the rent and performing his covenants, it was held that the performance of the lessee's covenants was a condition precedent to the right of renewal. Bastin v. Bidwell, 18 Ch. D. 238.

§ 340. **Renewed Lease, Effect of.** — Taking a new lease is a surrender of the old one; but a renewed lease is to be considered as a continuance of the original lease for the protection of all legal interests carved out of it; which, when once well created, the law does not permit to be destroyed.¹ It was therefore formerly considered necessary to obtain the concurrence of all the under-lessees to a surrender of their existing interests, in order to obtain a renewal of the principal lease, and such renewal might have been prevented or delayed by the refusal of one under-tenant to surrender his lease; and if there was no covenant in the under-lease to that effect, the court possessed no power to compel the under-tenant to surrender.² But the Statute 4 Geo. II. c. 28, § 6 [generally adopted in the United States], provided that, in case any lease shall be surrendered in order to be renewed, the renewal shall be valid without a surrender of the under-leases derived out of the original lease; allowing all the parties, however, to enjoy their rights and remedies in the same manner and to the same extent as if the original lease still continued.

SECTION VI.

THE COVENANT TO PAY TAXES AND ASSESSMENTS.

§ 341. **By Landlord, implied.** — **Tenant may pay Taxes, &c., to protect himself.** — Another obligation which the law imposes upon a landlord, when the lease or statute imposing the tax is silent upon the subject, is the payment of all State, city, and county taxes and assessments, which during the term may become chargeable upon the premises, as well as ground-rent

¹ *Collett v. Hooper*, 13 Ves. 260. Where new leases are regarded as a continuance of the original term, as in the case of church leases, a mortgage of the leasehold premises attaches to a continuance of the lease. *Gibbes v. Jenkins*, 3 Sandf. Ch. 180. The acceptance by a lessee of a renewal is not a satisfaction of a breach of the lessor's covenant; as for quiet enjoyment. *Lord v. Vreeland*, 15 Abb. Pr. R. 122. So the continued tenancy by lessee's election is not a surrender, but the obligations of all the covenants in the lease remain. *House v. Burr*, 24 Barb. 525.

² *Colchester v. Arnold*, 2 Vern. 383.

to which the property may be subject.¹ [But this rule does not apply as to tenancies for life, in which the tenant is liable for taxes and similar annual burdens.²] A covenant is sometimes introduced into the lease, by which the tenant undertakes to pay the taxes;³ but, in the absence of such a covenant, the tenant may pay them, and deduct the amount of them out of the rent; for the landlord is bound to protect his tenant from all paramount claims. When, therefore, a tenant has been compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent, whether due or to become due.⁴ [And it seems that the tenant may purchase the leased premises at a tax sale thereof, and set up his tax title as a defence to the landlord's action for rent.⁵]

¹ *Taylor v. Zamira*, 6 Taunt. 524; *Carter v. Carter*, 5 Bing. 409; *Stubbs v. Parsons*, 3 B. & A. 516; *Watson v. Atkins*, *id.* 647; *McFarlane v. Williams*, 107 Ill. 33. A tax is a burden or charge imposed in respect of the ownership of property; and when this is under demise, the landlord is liable because he receives the equivalent in rent. But the statutes and the construction of courts, based on the permanent or temporary character of the charge, has in many cases thrown the burden on the tenant. See §§ 395 *et seq.*, *post.* An assessment for a supposed benefit is not a tax. *Amenia v. Stanford*, 6 Johns. 92; *Sharp v. Speir*, 4 Hill, 76. In a lease of a warehouse the lessor covenanted to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London. It was held that water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant. *Badcock v. Hunt*, 22 Q. B. D. 145.

² *Prettyman v. Walston*, 34 Ill. 191; § 318, and notes, *ante*.

³ It is held that such a covenant does not bind the lessee to repay to the lessor a penalty paid by the latter in order to redeem the land from a tax sale. *Webster v. Nichols*, 104 Ill. 160. The covenant to pay taxes runs with the land. *West Va. C. & P. R. R. v. McIntire*, 44 W. Va. 210.

⁴ *Graham v. Allsopp*, 3 Exch. 186; *Jones v. Morris*, *id.* 742; *McPherson v. Atl. & Pac. R. R. Co.*, 66 Mo. 103. By Mass. Pub. Stat. c. 11, § 17, the tenant paying taxes may recover them of the landlord unless there be an agreement to the contrary.

⁵ *Waggener v. McLaughlin*, 33 Ark. 195; *Weichselbaum v. Curlett*, 20 Kan. 709; §§ 705 *et seq.*, *post.*

The landlord sometimes covenants to pay a certain portion of such charges; but, according to the English cases, he is chargeable only in proportion to the rent he receives. And where he covenanted to pay taxes, and the premises were taxed at £150, and he received only £120 for rent, the covenant was held to be satisfied by the payment of the tax at the rate of £120.¹ If he expressly covenants to pay all taxes charged or to be charged upon, or in respect of the land during the continuance of the term, and gives the lessee permission to build on the land, who subsequently builds, and thereby increases the annual value of the premises and with it the amount of the taxes, the landlord will be bound to pay taxes only in proportion to the value of the land without the building, and the tenant must make up the balance for the improved value.²

§ 342. **Landlord's Liability to reimburse Tenant for Payments.**—The obligation of the landlord to pay public charges against the property, except such as the tenant has expressly undertaken to pay, renders him liable to reimburse the tenant for all payments which the tenant has made in order to protect his goods, or the property leased, from demands of the public collector.³ But on a lease for years, rendering a fixed sum for rent, free and clear from all manner of taxes, charges, and impositions whatsoever, the lessor is entitled to receive the whole rent, without deduction for taxes, or charges of any kind.⁴ And where the goods of an out-going tenant, left by him on the farm, were distrained for a tax payable by the tenant in whose time it became due, and who received the benefit of the improvement, and which the statute gave him power to deduct from his rent, it was held that, as the tax must ultimately fall on the landlord, and the tenant had been

¹ *Yaw v. Leman*, 1 Wils. 21. A covenant by the landlord to pay the land tax binds him only to pay land tax in proportion of rent. *Whitfield v. Brandwood*, 2 Stark. 388; and see *Watson v. Atkins*, 3 B. & A. 647.

² *Watson v. Home*, 7 B. & C. 285.

³ *Spencer v. Parry*, 3 Ad. & E. 331; *Lubbock v. Tribe*, 3 M. & W. 607.

⁴ *Giles v. Hooper*, Carth. 135; *Brewster v. Kidgil*, 1 Salk. 198; s. c. 1 Ld. Ray. 317.

compelled to pay it in order to ransom his goods, he might recover the amount from the landlord as money paid to his use.¹

¹ *Dawson v. Linton*, 5 B. & A. 521. In New York, the interest of a lessee of real estate is taxable as real property, notwithstanding that, as between heirs and executors, it is personal property. *Trustees v. Dunn*, 22 Barb. 402. Such a tax would not of course fall upon the landlord. And see §§ 14, 14 *a*, 50, *ante*. But rents due upon leases for twenty-one years are taxable as the personal estate of the landlord, and such rents continue to be taxable until the end of the term, although, at the time of laying the tax, such leases have but a few years to run. And a landlord cannot evade this liability by setting up an agreement between himself and his tenant that a new lease shall be executed for the unexpired term. *Livingston v. Hollenbeck*, 4 Barb. 9; *Le Couteulx v. Sup. of Erie Co.*, 7 Barb. 249; *Buffalo v. Le Couteulx*, 15 N. Y. 451. Nor is there any difference, in this respect, between agricultural and city property; or whether the tax is levied for city, county, or State purposes. *Ibid*.

CHAPTER IX.

COVENANTS ON THE PART OF THE LESSEE.

SECTION I.

OF THE COVENANT TO REPAIR, AND HEREIN OF WASTE.

§ 343. *How far implied.*—Independent of an express agreement on the part of a tenant, and in the absence of the landlord's undertaking to keep the premises in repair, the law imposes upon every tenant, whether for life or for years, an obligation to so use the premises that no substantial injury shall be done to them, and so that they may revert to the lessor at the end of the term unimpaired by wilful or negligent conduct on his part.¹ A tenant for years, or from year to year, must therefore keep the premises wind and water tight,² and make fair and tenantable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation.³ As to a furnished house; he must take care of the furniture, and leave it with the linen, &c., clean and in good order.⁴ But he is not bound to rebuild premises which have accidentally become ruinous during his occupation, unless he is under a covenant

¹ *U. S. v. Bostwick*, 94 U. S. 53; *Miller v. Shield*, 55 Ind. 71.

² *Ulrich v. McCabe*, 1 Hitt. 251; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Pasteur v. Jones*, 1 Daly, 178; *Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 *id.* 327; *Parrott v. Barney*, Deady, 405.

³ *Cheetham v. Hampson*, 4 T. R. 318; 18 Ves. 331; *Hitner v. Ege*, 28 Pa. St. 305; *Ferguson v. —*, 2 Esp. 590. See § 330, note, *ante*; § 375, note, *post*.

⁴ *White v. Nicholson*, 4 M. & G. 95; *Stanley v. Agnew*, 12 M. & W. 827.

to rebuild.¹ He is not liable for the ordinary wear and tear of the premises;² nor answerable if they are accidentally burnt down; nor bound to rebuild a fallen chimney; or replace doors and sashes worn out by time; to put a new roof on the building; or to make such other substantial and lasting repairs as are called general repairs.³ Nor is he bound to do painting, whitewashing, or papering, which are mere matters of ornament (unless these are necessary to preserve exposed timber from decay), even although he be under a covenant to leave the premises "in good and sufficient repair, order, and condition."⁴ [It is to be observed that there is no implied contract to use the premises in a tenantlike manner when there is an express covenant on the part of the tenant to repair; for *expressum facit cessare tacitum*.⁵]

§ 344. **In Farming Leases.** — As to farming leases, a tenant is also under a similar obligation to repair, but it differs from his liability to repair houses in that it extends only to the dwelling-house occupied by the tenant; the burden of repairing out-buildings and other erections on the farm, being sustained either by the landlord or the tenant (in the absence of any express provision in the lease), according to the particular custom of the country in which the farm is situated. But the tenant is always bound to keep the soil in a proper state of cultivation; and to preserve the timber and ornamental trees upon it in good order.⁶ The relation of landlord and tenant is a sufficient consideration for a

¹ *Auworth v. Johnson*, *supra*; *Bullock v. Dommitt*, 6 T. R. 650; *U. S. v. Bostwick*, *supra*. See *Merryman v. Shipley*, 46 Md. 79.

² *Torriano v. Young*, 6 C. & P. 8.

³ *Leach v. Thomas*, *supra*; *Doe v. Amey*, 12 Ad. & E. 476; *Horsefall v. Mather*, Holt, 7; *Eagle v. Swazye*, 2 Daly, 140; *Brown v. Crump*, 1 Marsh. 567. Such as renewing the floor of a stable. *Johnson v. Dixon*, 1 Daly, 178.

⁴ *Wise v. Metcalfe*, 10 B. & C. 299. The leaving of nine cart-loads of ashes, brickbats, and rubbish by a tenant on quitting the demised premises, is not a breach of his covenant to peaceably yield up the premises in good tenantable repair. *Thorndike v. Burrage*, 111 Mass. 581.

⁵ *Standen v. Christmas*, 10 Q. B. 185.

⁶ *Herne v. Benbow*, 4 Taunt. 764; *Co. Lit.* 53.

promise by the tenant to treat the farm in a husbandlike manner, and to keep the fences in repair, as well as to cultivate the lands according to the custom of the country; though not for a promise to repair, or to spend a certain amount annually for manure.¹ And in an action against a tenant, upon his promise to occupy the farm "in a good and husbandlike manner, according to the custom of the country," an allegation that he had not so occupied it was held to be sustained by proof that he had used it contrary to the prevalent course of husbandry in that neighborhood; as, by tilling half his farm at once, when no other farmer there tilled more than a third, while many tilled only a fourth.² And it is unnecessary to show any definite custom or usage in respect to the quantity tilled. [So to till a farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country in which it is situated, constitutes waste.³] All these duties fall upon a tenant without any express covenant on his part; and a breach of them will, in general, render him liable to be punished for waste, without regard to the person by whom the act of waste may be committed; for it has been held, since the time of Coke, that a tenant, whether for life or for years, must answer for waste done by a stranger, and must take his remedy over.⁴

§ 345. **Waste. — Voluntary or Permissive. — Particular Acts of.** — Waste is usually defined to be a spoil or destruction in houses, lands, or tenements, to the damage of him who is in reversion or remainder; and it may be either *voluntary* or *permissive*. It is voluntary where the tenant does some positive injury to the premises, as by pulling down or destroying

¹ *Brown v. Crump*, 1 Marsh. 567; s. c. 6 Taunt. 800; *Powley v. Walker*, 5 T. R. 373; *Tempest v. Rawling*, 13 East, 18; *Cheetham v. Hampson*, *supra*; *Walker v. Tucker*, 70 Ill. 527, 534.

² *Lagh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 8 Moore, 536. To cultivate land in a workmanlike manner, means to cultivate it in a farmer-like manner, or as good farmers usually do. *Aughinbaugh v. Coppenheffer*, 55 Pa. St. 347.

³ *Wilds v. Layton*, 1 Del. Ch. 226.

⁴ *Taylor v. Whitehead*, 2 Doug. 745; *Attersoll v. Stevens*, 1 Taunt. 198; *Cook v. Champ. Tr. Co.*, 1 Den. 104. See §§ 686 *et seq.*, *post*.

a house, ploughing up a flower-garden, or the like; and permissive when he neglects to do that which might have prevented the waste, as by suffering a house to fall down or decay for want of repair. It may occur in respect to the soil, as well as to buildings, trees, fences, or live-stock on the premises.¹ It is a general principle that the law considers everything to be waste which does a permanent injury to the inheritance; and, therefore, where the value of the land consists principally in hemlock timber growing upon it, the act of cutting such timber and peeling the bark, when the cutting is not necessary and proper for the purpose of cultivation, will be waste.² To open new mines in land which has been demised without making mention of mines,³ to dig and carry away the soil, dig clay, open gravel-pits, and the like (unless for the repair of the premises), are instances of voluntary waste, because these things do an injury to the inheritance.⁴ So is it waste to cut timber; to use the soil for making brick; to change the face of the soil by converting arable land into pasture, or pasture land into arable; to turn garden ground into tillage; to sow grain in hop grounds; to plough up strawberry beds; and, in short, to essentially vary, in any manner, the quality of the soil, or the nature of its produce; for it not only changes the course of husbandry, but the landlord is thereby in danger of losing evidence of the identity of his property.⁵ [Since voluntary waste con-

¹ Co. Lit. 53, b; 2 Roll. Abr. 816, l. 15; U. S. v. Bostwick, 94 U. S. 53; Derixson v. State, 65 Ind. 385.

² People v. Alberty, 11 Wend. 162; Jackson v. Bronson, 7 Johns. 227; Livingston v. Reynolds, 26 Wend. 115; Kidd v. Dennison, 6 Barb. 9; Pyncheon v. Stearns, 11 Met. 304.

³ See Harlow v. Lake Sup. Iron Co., 36 Mich. 105; Eley's Appeal, 103 Pa. St. 300.

⁴ Livingston v. Reynolds, 2 Hill, 157; Coates v. Cheever, 1 Cow. 460; Saunders's Case, 5 Co. 12, a; 22 Vin. Abr. 439; U. S. v. Bostwick, *supra*.

⁵ Livingston v. Reynolds, 26 Wend. 122; Watherell v. Howells, 1 Camp. 227; Sarles v. Sarles, 3 Sandf. Ch. 601; Shipley v. Ritter, 7 Md. 408; Clement v. Wheeler, 25 N. H. 361; Queen's Coll. Oxford v. Hallett, 14 East, 489, 2 Roll. Abr. 815; Harrow School v. Alderton, 2 B. & P. 86. Besides, the tenant has no authority to assume the right of judging what may be an improvement to the inheritance; but must confine himself to the conditions of his lease. Per Paige, J., in Kidd v. Dennison, *supra*.

sists in doing something which the tenant is prohibited by law from doing; and permissive waste in permitting something to happen which the tenant is bound by law to prevent; the one being an offence of commission, the other of omission; it follows that waste cannot arise from the use of the premises in a reasonable and proper manner, as where a grain warehouse was stored with grain in a proper way, by reason of which a floor gave way.¹ Since the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it may not be a question of fact to be determined by evidence whether an act complained of causes such damage; for certain acts are in contemplation of law injurious *per se* to the inheritance, and the only subject of inquiry for the jury is whether such acts have been committed,² and to what extent they have damaged the plaintiff's estate and inheritance.³]

§ 346. **Waste. — Consists in First Opening of Soil. — Tends to destroy the Demised Property. — Examples. —** Waste is said to consist in the first opening of the soil; and, therefore, it is not waste to continue to dig in mines or pits already open, and which have become part of the annual profit of the land. And if mines, pits, &c., be expressly named in the lease, so as to show an intent that the lessee should have the benefit of their produce, it will not be waste for him to open them;⁴ or where clay or marl are taken from the soil, for the pur-

¹ *Saner v. Bilton*, 7 Ch. D. 815; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507. See *Chalmers v. Smith*, 152 Mass. 561, as cited § 347, *post*.

² *McGregor v. Brown*, 10 N. Y. 114.

³ *Harder v. Harder*, 26 Barb. 409.

⁴ *Crouch v. Puryear*, 1 Rand. 258; *Saunders's Case*, 5 Co. 12. It was further decided in the latter case, that if the land be leased in which there is a hidden mine, and the lessee opens it, and then assigns his estate, the assignee cannot dig in it; and if the lessee assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., the exception is void. *Doe v. Wood*, 2 B. & A. 724. So it has been held that the opening of a new mine is waste, and that a lease of a lot of ground, without any reference to mines or quarries, was simply a grant of the superficies of the soil. *Owings v. Emery*, 6 Gill, 260. See § 17 *a*, *ante*.

pose of repairing the buildings or improving the land, this will not be waste.¹ Neither will it be waste to dig trenches to carry off water, or to cut turf for actual use.² But anything tending to the destruction of the subject of the demise is waste; as, if the lessee cuts down pear, apple, or other fruit-trees; or they are blown down by tempest, and he afterwards roots them up, or cuts down the growing germins, without planting new.³ So if he destroys, or suffers the stock of a dovecot, warren, park, or fish-pond to be diminished, so that there is not such sufficient store left as he found when he came in.⁴ And if he voluntarily puts repairs upon the premises, he cannot afterwards displace and remove them without committing waste.⁵

§ 347. **Specific Acts of Waste.** — If the tenant suffers the land to be overflowed or surrounded by water, through his negligence in permitting the embankments to fall into decay, he will be chargeable with permissive waste to the soil; but if the overflow or other injury be caused by a tempest he will not be answerable for the accident unless he omits to repair the damage.⁶ If a house be destroyed by tempest, fire from lightning, or the like, which is the act of God, it is not waste,⁷ for *actus Dei nemini facit injuriam*. But it becomes waste if the damage by tempest was made possible by the tenant's previous neglect to repair; or if he does not forthwith proceed to repair.⁸ If the house was in a ruinous condition when the tenant came in, and he pulls it down, it

¹ Moyle v. Mayle, Owen, 66.

² 2 Roll. Abr. 820, l. 28; Co. Lit. 53, b; Lord Courtown v. Ward, 1 Sch. & L. 8.

³ 2 Roll. Abr. 817, l. 85; Co. Lit. 53, a; Lashmer v. Avery, Cro. Jac. 126; U. S. v. Bostwick, 94 U. S. 53.

⁴ Co. Lit. 53, a; 2 Inst. 304.

⁵ Caldwell v. Enkas, 2 Mill. Const. 348.

⁶ Griffith's Case, Moore, 62; Co. Lit. 53, b; Reg. v. Leigh, 10 Ad. & E. 398.

⁷ Co. Lit. 53, a. But if the house was burnt by the tenant's negligence, it is waste, Co. Lit. 53, b; or if the roof were blown off, it would be waste unless he repaired it in a reasonable time. 2 Roll. Abr. 820; U. S. v. Bostwick, 94 U. S. 53.

⁸ Moore, 62; Viner's Abr. Waste (1).

will be waste, unless he builds it up again.¹ And if glass windows (although glazed by the tenant himself) be broken or carried away, it is waste; for the glass is part of the house, and the tenant must, at his peril, keep the house from wasting. [If a tenant at will places in a building a weight which is apparently, and in fact, excessive whereby the building falls, this is waste, and a breach of the implied agreement to use the premises in a tenant-like manner.²] Waste may be done in respect to animals; as by taking or destroying so many of them as to unstock the dovecot, warren, park, or fish-pond, in which they are kept;³ or if the tenant stops the pigeon-holes, so that the pigeons cannot build, or suffers the park paling to be decayed, so that the deer stray away and are lost.⁴

§ 348. **Voluntary Waste, what. — Examples.** — Voluntary waste to buildings at common law occurs, not only where they are deliberately pulled down or unroofed, but also where one kind of building is altered into another, even though it may be thereby improved in value; as, for instance, by changing a corn-mill into a fulling-mill; a dwelling-house into a store;⁵ or a hall into a stable;⁶ throwing two rooms into one;⁷ pulling down the house and rebuilding it upon a greater or less scale than before; or converting a brew-house, which let for £120 per annum, into dwelling-houses, which let for £200 per annum; because, as it was said, of the alteration of the nature of the thing, and of the evidence;⁸

¹ Co. Lit. 53, a.

² *Chalmers v. Smith*, 152 Mass. 561.

³ *Vavasor's Case*, 2 Leon. 222; 4 *id.* 240.

⁴ *Moyle v. Mayle*, Owen, 66.

⁵ *Douglas v. Wiggins*, 1 Johns. Ch. 435.

⁶ *Greene v. Cole*, 2 Saund. 252; s. c. 1 Lev. 309, and 1 Mod. 94; Co. Lit. 53, a; *Jackson v. Cator*, 5 Ves. 689. In *Sweetser v. Eames*, 3 Dane, Abr. 233, it was held not to be waste for the lessee of a corn and grist mill to turn the mill into one for grinding dyewoods, although the lessee took away a part of the apparatus for grinding corn, and substituted others.

⁷ 2 Roll. Abr. 815; 22 Vin. Abr. 439; *London v. Greyme*, Cro. Jac. 181; *Wotton v. Wise*, 47 N. Y. S. C. 515. So removal of mantels, *Ibid.*

⁸ *Bonnett v. Saddler*, 14 Ves. 526; *Lathrop v. Marsh*, 5 Ves. 260, and

besides which, it might have the effect of casting an additional obligation on the reversioner, which he might not consider an improvement. It was therefore held to be incompatible with his landlord's interest for a tenant to make any such alterations, unless he was justified by his express permission.¹ But this strict rule of the common law has been modified in this country, and, now, it is not waste for a tenant to erect a new edifice upon the demised premises, or make an alteration therein, if this can be done without materially injuring the buildings or other improvements already existing thereon.² He has no right to pull down valuable buildings, or to make improvements or alterations, which will materially and permanently change the nature of the property, so as to make it impossible for him to restore the premises at the expiration of the term, substantially as he received them; but to apply the ancient doctrine of waste to modern tenancies would stop the progress of improvement, and deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any advantage to the owner of the reversion.³

§ 349. **Permissive Waste, what. — Examples.** — Permissive waste to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by

note; *Grey de Wilton v. Saxton*, 6 *id.* 106. Alterations of the house demised are not of course waste, when made without the concurrence of the lessor, unless they are prejudicial to the estate. *Jackson v. Tibbitts*, 3 *Wend.* 341.

¹ *Agate v. Lowenbein*, 57 *N. Y.* 604. Here the tenant was authorized to alter as he thought proper, provided no injury was caused. It was held that this only authorized alterations required by his business.

² *Jackson v. Tibbitts*, 3 *Wend.* 341. But it is held that a lessee in possession under a lease for years commits waste when, without the permission of the lessor, he partially destroys a party wall by cutting out an opening for a door to connect with adjoining premises, although with the permission of the other joint owner of the wall. It is said that the test is not alone whether a material injury is done to the building, but whether it is altered in a material manner and to an extent beyond what is permitted by the original contract of letting. *Klie v. Von Broock*, 56 *N. J. Eq.* 18.

³ *Winship v. Pitts*, 3 *Paige*, 259.

neglecting to cover the house; or suffering the walls to fall into decay for want of plastering;¹ or the foundation to be injured by neglecting to turn off a stream of water.² So if the house or other erection on the premises is destroyed by fire, through the carelessness or negligence of the tenant, it is permissive waste,³ and he must rebuild in a convenient time at his own expense. The law protects a tenant from the consequences of a misfortune of this kind, only in case the casualty has been purely accidental.⁴ Merely suffering the house to remain unroofed (provided it was so at the commencement of the lease) will not be waste; but the tenant must take the consequences of any other portion of it thereby becoming ruinous or decayed.⁵ To permit walls built to exclude water to remain in a dilapidated condition so as to cause the land to be overflowed and injured is waste; but not, if it be suddenly surrounded by the violence of the sea, as by a tempest, without fault of the tenant.⁶ And though the destruction of a house by lightning, tempest, or a public enemy, is not waste, to suffer it to remain ruined will be so considered.⁷ Its destruction by a mob is said to be waste.⁸ A tenant at will is not liable for permissive waste.⁹

§ 350. **Waste by cutting Wood.** — Not only local custom, but the circumstances of the case must be taken into account in determining whether the cutting of any given wood is waste.¹⁰ To destroy a wood of willows or of hazels is waste;

¹ Co. Lit. 53, a; 2 Roll. Abr. 815, l. 31.

² Sticklehorne v. Hatchman, Owen, 43.

³ Lothrop v. Thayer, 138 Mass. 466, where the text authorities are collected.

⁴ Co. Lit. 53, b; Rook v. Warth, 1 Ves. Sr. 462.

⁵ 2 Roll. Abr. 818, l. 1.

⁶ Griffith's Case, Moore, 69.

⁷ Co. Lit. 53, a.

⁸ White v. Wagner, 4 Har. & J. 373. But see Saner v. Bilton, 7 Ch. D. 815; Manchester Bonded Warehouse Co. v. Carr, 5 C. P. D. 507.

⁹ Harnett v. Maitland, 16 M. & W. 256; Parrott v. Barney, Deady, 405; Coale v. Han. & St. J. R. R., 60 Mo. 227; Lothrop v. Thayer, 138 Mass. 466. So not for permissive waste by a stranger: *Ibid.*; and therefore he cannot maintain an action against a stranger for such waste.

¹⁰ It is held that a custom to remove flints coming to the surface in

but cutting willows and hazels in a wood of oak, which are underwood, is not waste.¹ To cut trees which are not timber and which are growing in defence of, or to ornament the house, or to injure fruit-trees growing in an orchard or garden, is waste.² In determining whether trees appertaining to a dwelling-house are ornamental trees or not, it is important to ascertain whether they have been considered and treated as such by the owner of the premises.³ Cutting willows which grew on the bank of a river, by which the bank fell down and a meadow adjoining was overflowed, was held to be waste.⁴ Cutting a ditch from a river and diverting its channel so as to overflow a swamp covered with timber, by means of which the timber died, was held not to be waste, when it appeared that a new and better growth of timber had sprung up, which was worth more than the old timber.⁵ The general property in timber trees is in the owner of the inheritance of the land on which they grow; that in the bushes and underwood is in the tenant.⁶ Accordingly, if timber trees are blown down by the wind or severed by a trespasser, they belong to the lessor, and not to the tenant for life or years, as part of the inheritance.⁷ But if trees not fit for timber are cut down by the lessor, the property in such trees is vested in the tenant; for the lessor would have no right to them if severed by the act of God, and, therefore, can have no right to them where they have been severed by his own wrongful act; and the same rule ploughing, this being necessary to proper cultivation, is reasonable; and that notwithstanding the reservation of minerals in the lease, such removal is not waste. *Tucker v. Linger*, 21 Ch. D. 678, 8 App. Cas. 508.

¹ Bro. Waste, pl. 21.

² Co. Lit. 53, a, b.

³ *Hawley v. Wolverton*, 5 Paige, 522.

⁴ *Stripling's Case*, 22 Vin. Abr. 449, pl. 11.

⁵ *Jackson v. Andrew*, 18 Johns. 431.

⁶ *Berriman v. Peacock*, 9 Bing. 386. A sale of standing trees by parol is a sale of an interest in land, and void by the Statute of Frauds. *McGregor v. Brown*, 10 N. Y. 114.

⁷ *Ward v. Andrews*, 2 Chit. 636; *Mooers v. Wait*, 3 Wend. 104. Although a tenant for years has a right to reasonable estovers, he has no property in trees felled by another. *Bulkley v. Dolbeare*, 7 Conn. 235.

holds where they have been severed by a stranger.¹ What constitutes timber depends much upon the custom of the place where it grows;² but it has been said that trees must be at least twenty years old to constitute timber, and must also be fit for building purposes.³

§ 351. **Tenant may cut Wood for Necessary Repairs or Estovers.** — A tenant, whether for life or for years, may lawfully cut timber trees for the necessary repairs of the house and fences, even though he has agreed to repair at his own charge;⁴ but this must be for the repair of buildings which were on the premises when he entered, and not for such as he may subsequently have erected.⁵ And he is entitled to take reasonable *estovers*, that is, wood from the land, for fuel, fences, agricultural erections and other necessary improvements.⁶ Nor is it absolutely necessary that such firewood be used on the premises if it is taken in good faith for the use of the tenant and his servants, in reasonable quantities; and the inheritance is not injured.⁷ If the house be destroyed, or injured by accidental fire, the tenant may cut timber to rebuild it; but he cannot cut timber to sell, or to build a new house or new fences where none were before.⁸ Such cutting must be for repairs which are presently needed, and not for such as are only likely to become necessary,⁹ nor for such as are made necessary by his own negligence; for, if he suffer the buildings to fall into decay, and then cut timber to repair them, he will be guilty of double waste.¹⁰

¹ Channon v. Patch, 5 B. & C. 897; 2 Chit. 636.

² Co. Lit. 53, a; Kidd v. Dennison, *supra*.

³ Duke of Chandos v. Talbott, 2 P. Wms. 606; Dunn v. Bryan, 7 Ir. R. Eq. 143. Trees, even such as may become timber by a growth of twenty years, may, if under that age, be cut by a lessee, if they are cut seasonably or as has been done usually in the neighborhood. *Ibid*.

⁴ Moore, 23; Co. Lit. 54, b; Harder v. Harder, 26 Barb. 409.

⁵ Co. Lit. 53, a; 41, b.

⁶ Hubbard v. Shaw, 12 Allen, 120; Walters v. Hutchins, 29 Ind. 136; Harris v. Goslin, 3 Har. 340.

⁷ Gardiner v. Dering, 1 Paige, 573; Co. Lit. 41, b.

⁸ Mooers v. Wait, 3 Wend. 104; Davey v. Asquith, Hob. 238.

⁹ Georges v. Stanfield, Cro. El. 598.

¹⁰ Padelford v. Padelford, 7 Pick. 152; Co. Lit. 58, b; 2 Roll. Abr. 822, l. 88; Conner v. Shepherd, 15 Mass. 164.

And, if a lessee is authorized by his lease to cut wood for fuel or fencing, he must comply substantially with the conditions of his lease. He cannot omit for years to take firewood and fencing timber from the premises, suffering the wood proper for those uses to be destroyed and wasted, and then, by way of compensation or indemnity, take timber and wood to which the lease gives him no right.¹

§ 352. **Timber felled must be for Actual Repairs. — Firewood. — Clearing Land.** — The timber must also be actually and immediately employed in the repairs for which it was cut; for if the tenant cuts timber and sells it, and out of the proceeds repairs the house,² or if he sells it and afterwards buys it again, and then uses it for repairing, he will, in either case, be guilty of waste; for the selling of the trees is waste.³ It has been held to be waste, also, if he cuts timber for necessary repairs, which turns out to be unfit for that purpose, and he exchanges it for other timber, which is applied to the repairs; for the tenant must, at his peril, select such trees as are fit and use them accordingly.⁴ But in Massachusetts, it was held that it was not waste in a tenant for life to cut down timber trees to repair, and sell them to procure boards for the purpose, if that mode of exchange was most beneficial for the estate.⁵ And whether trees have been cut for the *bonâ fide* purpose of repairing is always a question of fact.⁶ Although a tenant may cut firewood for his own use, he may take none to sell, nor more than is reasonable; nor can he cut it so long as there is sufficient dead wood on the premises for his use.⁷ He may, however, cut dead timber trees, and such trees as are neither timber nor grow in defence of the

¹ Clarke v. Cummings, 5 Barb. 339.

² Vin. Abr. Waste (M.), pl. 1, note. Liberty to smelt ore includes the right to cut timber for that purpose. Wilson v. Smith, 5 Yerg. 379.

³ Co. Lit. 53, b; Doe v. Wilson, 11 East, 56; Mooers v. Wait, 3 Wend. 104.

⁴ Simmons v. Norton, 7 Bing. 640.

⁵ Loomis v. Wilbur, 5 Mass. 13.

⁶ Doe v. Wilson, *supra*.

⁷ Simmons v. Norton, *supra*; Archdeacon v. Jennor, Cro. El. 604; 7 Bac. Abr. 252.

house.¹ But he may go no further than cutting; for, if he grubs up trees, hedges, or underwood, he is guilty of waste.² But when thorns, bushes, furze, or the like, are growing in pasture or arable lands, the tenant may lawfully stub them up; for this is good husbandry and not waste.³

§ 353. **Circumstances determine what is Waste.** — The law of waste accommodates itself to the varying wants and conditions of different countries, and that may not be waste in a woodland country which would be waste in a cleared one. A clearing of land in a new country would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial to the remainder-man, so long as a sufficiency of timber is left, and the cleared land bears a proper relative proportion to the whole tract.⁴ And it has been held that, if the cleared land on the estate was old and worn, and the proportion of woodland such that a prudent farmer would have considered it best to reduce a portion of it to cultivation, and thereby relieve the old land from an excess of culture, and thus enhance the value of the estate, — such clearing would not be waste, provided sufficient timber for the permanent use of the estate was left.⁵ As to

¹ *Gage v. Smith*, 2 Roll. Abr. 817, l. 17.

² *Lashmer v. Avery*, Cro. Jac. 126.

³ *Maleverer v. Spinke*, Dyer, 37, a.

⁴ *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 258; *Den v. Kinney*, 2 South. 252; *McCracken's Heirs v. McCracken's Ex'rs*, 6 T. B. Monr. 342; *Hastings v. Crunckleton*, 3 Yeates, 261. It is held in England that under an agreement to keep a house in "good tenantable repair" and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. *Proudfoot v. Hart*, 25 Q. B. D. 42. Under a covenant to "repair, uphold, and maintain," the defect having been caused by the natural operation of time and the elements upon a house the original construction of which was faulty, the lessee was held not liable under the covenant. *Lister v. Lane*, 1893, 2 Q. B. 212.

⁵ *Owen v. Hyde*, 6 Yerg. 334; *Loomis v. Wilbur*, 5 Mason, 13; *Parkins v. Coxe*, 2 Hayw. 339. In this country, no act of a tenant amounts to waste, unless it is prejudicial to the inheritance. See § 345, *ante*.

woodlands, a waste is said to be "an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodlands where there is already sufficient cleared land for the tenant's cultivation, and over and above what is necessary to be used for fuel, fences, plantation, utensils, and the like."¹ But where wild land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation; but he may not cut so much even of this as to injure the inheritance; and to what extent he may go without committing waste is always a question of fact.² If he cuts trees merely for the sake of profit to be derived from a sale of the timber, and not for the purpose of preparing the land for cultivation, he is clearly guilty of waste. And although he may, from the commencement of his term, gradually clear up the woodland, and prepare it for cultivation, yet he will not be permitted, just before the expiration of his lease, to cut down timber upon that pretext.³ Where land was annexed to a furnace, the cutting of wood sufficient for the supply of the furnace was held in New Jersey to be no waste;⁴ while in North Carolina, it was held waste to cut down light-wood for tar.⁵

¹ *Ballentine v. Poyner*, 2 Hayw. 110; *Wilson v. Smith*, 5 Yerg. 379. In New York, any person entitled to the possession of lands or tenements sold under execution may, until the expiration of fifteen months from the time of such sale, use and enjoy the same without being guilty of waste. 2 R. S. 336, § 21.

² *Jackson v. Brownson*, 7 Johns. 227; *Adams v. Brereton*, 3 Har. & J. 124. If he cut trees for sale, and not for the purpose of preparing the land for cultivation, it is waste. *Kidd v. Dennison*, 6 Barb. 9; *People v. Davison*, 4 *id.* 109. And it was so held notwithstanding a parol consent by the landlord to the cutting, on condition that the tenant would clear and seed down the land where the trees were cut; such consent being a mere license; even although such acts were not injurious to the inheritance. *McGregor v. Brown*, 10 N. Y. 114.

³ *Kidd v. Dennison*, 6 Barb. 9; *Livingston v. Reynolds*, 26 Wend. 122; s. c. 2 Hill, 157.

⁴ *Den v. Kinney*, 2 South. 552.

⁵ *Parkins v. Coxe*, 2 Hayw. 339. The early American doctrine, on the subject of waste by cutting timber, was laxer than that in England, owing to the differing circumstances of the two countries. In England, timber is an object of extraordinary care, while in the United States, in former years, it was desirable to get rid of it. It was therefore said that what

§ 354. **Landlord entitled to Things unlawfully severed from the Soil.** — When the tenant commits waste by felling timber or pulling down houses, these still remain the property of the person entitled to the inheritance: for the tenant had them as things annexed to the soil, and when by his own wrongful act he severs them from the land he cannot gain a greater property in them than he had before.¹ And whether they were felled by the tenant or by some other person, or blown down by a tempest, the lessor is still entitled to them, in respect to his general ownership, and because they were a portion of his inheritance.² So also sea-weed thrown by the sea upon the beach vests in the owner of the soil as much as the wood, grass, or any other thing appurtenant to the ownership of the soil; though, as between landlord and tenant, the latter, doubtless, would be allowed to make use of it, unless it had been expressly reserved by the lease.³

§ 355. **Leases without Impeachment of Waste.** — Sometimes a clause is inserted in the lease, that a tenant shall hold the land “without impeachment of waste.” This expression is equivalent to an authority to commit waste, and, at common law, authorized him to cut timber, or open new mines, and convert the produce to his own use.⁴ But if the words were, “without impeachment of any action of waste,” they only gave the tenant a discharge from the action, and not the property in the thing granted.⁵ But equity now gives a more limited construction to the former clause, and allows the tenant for life those powers only which a prudent tenant would be deemed waste in England might not be so considered here; and that if a tenant in dower clears part of the land assigned to her, and does not exceed the relative proportion of cleared land, considered in reference to the whole tract, she could not be said to have committed waste. *Hastings v. Crunckleton*, 3 Yeates, 261.

¹ *Mooers v. Wait*, 3 Wend. 104; *Kidd v. Dennison*, 6 Barb. 9.

² *Bulkley v. Dolbeare*, 7 Conn. 232; *Liford's Case*, 11 Co. 48, a; *Bewick v. Whitfield*, 3 P. Wms. 266, 1 Coxe, 72; *Shult v. Barker*, 12 S. & R. 272; *Elliott v. Smith*, 2 N. H. 430.

³ *Emans v. Turnbull*, 2 Johns. 322.

⁴ *Pyne v. Dor*, 1 T. R. 55; *Williams v. Williams*, 15 Ves. 425; *Co. Lit.* 220, a; *Bowles's Case*, 11 Co. 81, b.

⁵ *Ibid.*; *Vane v. Lord Barnard*, 1 Salk. 161; 22 Vin. Abr. 505.

in fee ought to exercise. He cannot, therefore, pull down or dilapidate houses, destroy pleasure-grounds, or prostrate trees planted for shelter.¹ And where a lease contained a clause authorizing the lessee to make such alterations inside of the building as he should think proper, provided they did not injure the premises, it was held that while the clause authorized alterations which in point of law, and technically, would be waste, yet they must be only such acts as were unaccompanied with actual injury to the premises and not done wantonly or capriciously, but with a purpose of facilitating the transaction of the lessee's business.² A tenant for life, without impeachment of waste, is liable, on his express covenant, to repair, notwithstanding such a covenant is inconsistent with his estate; for where a man expressly covenants to do an act, which he would not otherwise be bound to perform, public policy requires that his contract shall be strictly observed; and he cannot be relieved from the responsibility he has imposed on himself by his deliberate act.³

§ 356. **Proper Cultivation required under the Covenant.** — Not only is waste prohibited by law, but the covenant further requires the tenant to cultivate the lands in a husbandly manner, and in conformity to the usual and reasonable custom of the country.⁴ This, however, intends only the usual course of cultivation, and not an extraordinary mode of agriculture.⁵ The parties may stipulate in what manner, and to what extent, the land shall be cultivated; but unless such a stipulation is made, the parties are to be governed by the usual practice and custom of the neighborhood.⁶ A tenant

¹ *Vane v. Lord Barnard*, 2 Vern. 788; 2 Eq. Cas. Abr. tit. Waste, pl. 8; *Packington's Case*, 3 Atk. 215.

² *Agate v. Lowenbein*, 57 N. Y. 604. In this case the authorities on the subject of waste are collated and discussed.

³ *Chesterfield v. Bolton*, Com. 627; *Barker v. Thorold*, 1 Saund. 47.

⁴ *Powley v. Walker*, 5 T. R. 373. The remedies for waste, both preventive and compensatory, are discussed in another part of this work. See § 686, *et seq.*

⁵ *Brown v. Crump*, 6 Taunt. 800.

⁶ *Doe v. Crouch*, 2 Camp. 449.

who has agreed to deliver up all the trees standing in an orchard at the time of the lease, reasonable use and wear only excepted, is not prevented from removing trees which are decayed and past bearing, from a part of the orchard which was overstocked.¹

§ 357. **Express Covenant, Effect of.** — When a tenant is under an express covenant to repair the premises, he is liable to make good all loss and damage which they may sustain, and must even rebuild in case of casualty by fire or otherwise.² Being annexed to the demised property, and forming part of it, this covenant runs with the land, and binds an assignee, although not named.³ It is also divisible, charging an assignee of part only of the premises;⁴ and the general covenant extends as well to buildings erected by the tenant as to those originally demised.⁵ And if the terms

¹ *Lekh v. Hewett*, 4 East, 154; *Wigglesworth v. Dallison*, Doug. 201; *Webb v. Plummer*, 2 B. & A. 746.

² *Cline v. Black*, 4 McCord, 431; *Ross v. Overton*, 3 Call, 309; *Pym v. Blackburn*, 3 Ves. 38; *Digby v. Atkinson*, 4 Camp. 275; *Phillips v. Stevens*, 16 Mass. 238; *Beach v. Crain*, 2 N. Y. 86; *Moyer v. Mitchell*, 53 Md. 171; *Hoy v. Holt*, 91 Pa. St. 88. In New York, a covenant by a lessee to make "all inside and outside repairs" imports a general covenant to make ordinary, not extraordinary, repairs, and does not deprive him of the protection of § 197, of the Real Property Law (L. 1896, c. 547), authorizing a tenant to surrender without further liability for rent, when, without his fault, the premises have been made untenable by the action of the elements. *May v. Gillis*, 169 N. Y. 330. It is held that under a lease which binds the lessee to keep the property in good repair, and to surrender it at the expiration of the lease in the same good order in which he received it at the beginning of the lease, he has the option to make the necessary repairs at the end of the term. *Payne v. James*, 42 La. An. 230. It seems that any municipal corporation which rents a building for municipal purposes impliedly obliges itself to care in the use of it, and may enter into a written agreement of lease containing the ordinary covenants against waste, etc., and if, through the negligence of the officers charged with the duty of caring for the premises, the building is destroyed by fire, the county is responsible in damages for its value. See *Williams v. Kearny County*, 61 Kan. 708, and cases cited.

³ *Spencer's Case*, 5 Co. 16; *Dean & Chapter of Windsor's Case*, 5 Co. 24, a; *Keeling v. Morrice*, 12 Mod. 371.

⁴ *Congham v. King*, Cro. Car. 221.

⁵ *Dowse v. Cale*, 2 Vent. 126; *Brown v. Blunden*, Skin. 121.

are clearly defined, and the agreement is distinct so as to designate the building, a specific performance will be decreed.¹ If a lessee who has erected fixtures for the purpose of trade upon the demised premises afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair, he will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise; though it is doubtful whether any circumstances outside of the deed can be alleged to show that they were not intended to pass.²

§ 358. **Forms of Covenant construed.** — Under a general covenant to repair,³ the tenant must take care that the tenement does not suffer more than the usual operations of time and nature will effect; but he is not bound to go further. He is only to keep up an old house as an old house; he is not obliged to put in new floors, or the like, but merely to repair the old ones, although a new floor might be the more substantial way of making the repair.⁴ [Thus, the age and condition of the house at the commencement of the tenancy are to be taken into account in considering whether the covenant has been broken; and the tenant must put the property in as good condition as can be done without change of form or material. But where the tenant covenants to keep the premises, and to deliver them up, at the expiration of the tenancy, in good repair, order, and condition, he is bound to put them into good repair, and is not justified in keeping them in bad repair, because he found them in that condition,⁵ but even in this case the extent of the repairs

¹ *Mosely v. Virgin*, 3 Ves. 184.

² *Thresher v. London Water Works*, 2 B. & C. 608.

³ A covenant to keep the premises "in as good repair as they now are" is held equivalent to the general covenant to repair. *Stultz v. Locke*, 47 Md. 562.

⁴ *Harris v. Jones*, 1 Mood. & R. 173; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Gutteridge v. Munyard*, 7 C. & P. 129; *Harris v. Coulbourn*, 3 Harr. 338; *White v. Albany Railway*, 17 Hun, 98.

⁵ Cases cited *supra*; *Ardesco Oil Co. v. Richardson*, 68 Pa. St. 162; *Mantz v. Goring*, 5 Bing. N. C. 451.

is to be measured by the age and class of the buildings.¹] Under a covenant substantially to repair, uphold, and maintain the house, the tenant is bound to keep up the inside painting.² Breaking glass has been held to be a breach of this covenant; so has the leaving of a pavement out of repair; for such things are said to be within the intention of the covenant, and belong to the building.³ Upon the like principle, it has been determined that carrying away the locks and keys of a cupboard, or its shelves, will constitute a breach; or breaking the wall of a house, for the purpose of making a doorway into an adjoining house.⁴ So, where a plaintiff granted to the defendant a right of way over his land, and covenanted to erect a gate at the terminus, the defendant, on his part, covenanting to make all the necessary repairs to said gate, — it was held that the defendant was bound to replace the gate when it had been removed by some unknown person.⁵ A covenant to keep a mill in necessary repair, although it imposes no obligation upon a tenant to add improvements, yet requires him to renew existing machinery when it gets too old or worn to answer its purpose in the mill.⁶ [And it is held that a tenant is bound to repair a foundation wall sinking by reason of its original defective construction,⁷ and that it is a breach of the covenant to remove from a barn a box-stall for horses, placed there by himself, since such removal is an injury to the freehold.⁸]

§ 359. Breach of, arises from Want of Substantial Repair. — With respect to breaches of this covenant, the usual question

¹ *Payne v. Haine*, 16 M. & W. 541; *Easton v. Pratt*, 2 H. & C. 676. But see *Doe v. Rowland*, 9 C. & P. 734.

² *Mark v. Noyes*, 1 C. & P. 265.

³ *Pyot v. Lady St. John*, Cro. Jac. 829; s. c. 2 Bulst. 102.

⁴ *Doe v. Jackson*, 2 Stark. 293.

⁵ *Beach v. Crain*, 2 N. Y. 86.

⁶ *Coke v. England*, 27 Md. 14.

⁷ *Lockrow v. Horgan*, 58 N. Y. 635. In *Halbut v. Forrest City*, 34 Ark. 246, it was held that the meaning of the parties should control the lessee's contract to redeliver the premises in any prescribed condition of good order or repair.

⁸ *Morgan v. Morse*, 27 Mich. 208.

is whether the premises have been kept in substantial repair, as opposed to claims for fancied injuries, such as a crack in a pane of glass, or the like.¹ And with a view to the determination of this question, the jury may inquire whether the premises were new or old at the time of the demise, and must render their verdict accordingly.² If, however, a lessee covenants to support and maintain the brick walls belonging to the demised premises, and he pulls down a brick wall which divides a front court-yard from another court at the side of the house, it will amount to a breach.³ But an enlargement of windows, opening external doors, and taking down partitions, is not a breach of the covenant to repair and keep in repair a dwelling-house, with all buildings, improvements, and additions, set up or made by the lessee.⁴ Nor is a tenant bound to renew the work in an improved or more durable manner.⁵ [The term "habitable repair" means a state of repair which makes the premises reasonably fit for occupation. Where a tenant leases premises out of repair, and covenants to put them into habitable repair, this implies that he is to put them into a better state than that in which he found them.⁶ It is held that a tenant is still bound to repair, although the agreement as to the duration of the term may be void under the Statute of Frauds.⁷]

§ 360. **Liability under, as affected by "Act of God."**—**Exception of "Fair Wear and Tear."**—A lessee will not in general be excused by an "act of God" from the performance of his express covenant which it is in his power to perform; but if he covenants to keep the premises in the "same state" in

¹ It is no breach of the covenant to leave in repair, that the tenant left a large quantity of rubbish in the cellar of the premises. *Thorndike v. Burrage*, 111 Mass. 531.

² *Stanley v. Towgood*, 3 Bing. N. C. 4; *Burdett v. Withers*, 7 Ad. & E. 186. A covenant by an under-lessee to repair after notice is not broken by a non-compliance with a notice to repair served upon the premises by the superior landlord. *Williams v. Williams*, L. R. 9 C. P. 659.

³ *Doe v. Bird*, 6 C. & P. 195.

⁴ *Doe v. Jones*, 4 B. & Ad. 126.

⁵ *Soward v. Leggatt*, 7 C. & P. 613.

⁶ *Belcher v. McIntosh*, 8 C. & P. 720.

⁷ *Richardson v. Gifford*, 1 Ad. & E. 52.

which they were when he took them, and trees are blown down, the covenant is not thereby broken; for it has, by the act of God, become impossible for him to keep this part of the covenant.¹ But the case is different if he cuts the trees himself, for he then breaks the covenant by his own act. And there is a difference, also, with respect to buildings; for whether these be destroyed by the act of God, by negligence, or by design, the covenant still remains binding, and the tenant will be guilty of a breach of it by failing to restore them, for this is clearly within his power.² If he undertakes to keep the house in as good repair as when he took it, "fair wear and tear excepted," he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term; nor is he under obligation to repair in case it should fall in consequence of its defective construction.³ The fact that the act of waste was committed by a stranger will not excuse the tenant; for the law gives him a remedy over but makes him responsible in the first instance.⁴ As, where a lessee for years covenanted that the buildings which he should erect should, at the expiration of the term, revert to the lessor "without damage of any kind, except the natural wear of the same," and a building so erected was destroyed by the negligent acts of a third party, it was held that this was waste for which the tenant was responsible to the lessor, and that the lessee or his assignee might recover, in an action against the party guilty of the negligence, the

¹ *Main's Case*, 5 Co. 20, b; *Shep. Touch.* 173.

² *Brecknock Canal Co. v. Pritchard*, 6 T. R. 750; *Compton v. Allen*, *Style*, 162; *Polack v. Pioche*, 35 Cal. 416. The injury caused by the breaking of a reservoir, overfilled by unusual rains, through the negligence of a stranger, is not within the exception of an act of God. *Ibid.*

³ *Arden v. Pullen*, 10 M. & W. 321; *Hess v. Newcomer*, 7 Md. 325; and see *Smith v. Stagg*, 47 N. Y. S. C. 514.

⁴ *Polack v. Pioche*, *supra*. So where the lessee covenanted that he and his assigns should not build, and a railway company compelled him to convey to them, by exercise of eminent domain, and then built, he was held not liable. *Baily v. De Crespigny*, 10 B. & S. 1. But where the erection took place after the company had notified him that they should take, but before they did take, the lessee was held liable. *Mills v. E. Lond. Union*, L. R. 8 C. P. 79.

value of the building.¹ But under a covenant to deliver up possession of the premises at the end of the term in as good order and condition as at the date of the lease, ordinary wear and tear excepted, the tenant is not bound to rebuild in case of fire, there being no covenant to repair or rebuild.² So where it was agreed that certain articles should constitute a portion of the demise, and remain on the premises at the end of the term, or else be replaced or paid for by the lessee, and the covenant to surrender the demised premises at the end of the term contained an exception of damage by the elements; the chattels having been destroyed by accidental fire during the term, it was held that the tenant was not bound to replace or pay for them, the last-mentioned covenant modifying the other.³ [If a lease contains a covenant by a lessor to put in repair, and a covenant by the lessee to

¹ *Cook v. Champlain Tr. Co.*, 1 Den. 91; 4 Kent, Com. 77.

² *Warner v. Hitchins*, 5 Barb. 666; *Miller v. Morris*, 55 Tex. 412; *Warren v. Wagner*, 75 Ala. 188; but see § 364, *post*, note. Under the Civil Code of Louisiana, the lessee is only liable for the injuries and losses sustained through his own fault. R. C. C. 2721. He can only be liable for the destruction occasioned by fire, when it is proved that the same happened either by his own fault or neglect, or by that of his family. R. C. C. 2723. *Schwartz v. Saiter*, 40 La. An. 264. The inability of lessees to operate a plantation in Louisiana on account of their financial failure and the fact that their creditors took possession of their movable property on the plantation, must be deemed to be a result of their own improvidence, and is not properly to be called a "fortuitous event" such as will relieve them from the payment of rent *pro tanto* for the time they were deprived of the use of the premises, where the lease provides for such a reduction for deprivation by a "fortuitous event;" the Civil Code of Louisiana defining this to be "that which happens by a cause which we cannot resist." *Taylor v. Kenner*, 162 N. Y. 513.

³ *Allen v. Culver*, 3 Den. 284. In a lease of a glass manufactory, and of the tools and moulds connected therewith, the lessee covenanted to return these to the lessor at the end of the term in as good order as they were in at the time of the demise, reasonable wear and tear and damages by fire excepted; and the lessor agreed that the lessee should have the privilege of expending a hundred dollars a year in repairs on the property, deducting the same from the rent. Held, that the terms of the lease neither limited the duties of the tenant in the matter of repairs, nor excused permissive waste arising from his suffering the premises to decay from want of necessary repairs. *Townsend v. Moore*, 33 N. J. 284.

keep in repair, the performance of the former is a condition precedent to requiring performance by the latter.¹ And where the tenant covenanted to leave the house in the same repair as it was put by the lessor, it was held that this included repairs done by the tenant before the beginning of the term at the landlord's instance.² The words "wear and tear" do not necessarily imply a gradual deterioration, but may include a sudden accident caused by a defect.³

§ 361. **Special Covenants construed.** — When a man covenants to keep buildings in repair during the term, and he pulls them down, or suffers them to decay, or omits to make necessary repairs, he becomes at once guilty of a breach of this covenant, and an action may be maintained against him thereon before the term has expired.⁴ If the covenant be merely to leave the premises in good repair [or to keep them in repair and leave them as found, no action is maintainable before the end of the term], for there could have been no breach during the occupation.⁵ And if he covenants to

¹ *Coward v. Gregory*, L. R. 2 C. P. 153.

² *Holbrook v. Chamberlain*, 116 Mass. 155.

³ *Hess v. Newcomer*, 7 Ind. 325.

⁴ *Luxmore v. Robson*, 1 B. & A. 584; *Shep. Touch.* 173. So *Doe v. Rowlands*, 9 C. & P. 734; *Gange v. Lockwood*, 2 Fost. & F. 115; *Block v. Ebner*, 54 Ind. 544; *Webster v. Nasser*, 2 Daly, 186. So where lessee covenanted to "maintain in repair:" *Buck v. Pike*, 27 Vt. 529; and the measure of damages is not the cost of repairing, but the injury done to the reversion: *ibid.*; *Smith v. Peat*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412.

⁵ *Atkins v. Chilson*, 9 Met. 52, 63; *Schieffelin v. Carpenter*, 15 Wend. 409; *Hopkins v. Bradford*, 1 Pitts. 165. Where the covenant to repair is general, and no time is fixed when the repairs are to be done, the tenant has the whole term to do them in. *Colhoun v. Wilson*, 27 Gratt. 639. So in a lease containing a general covenant to repair, and a covenant to repair on three months' notice, no action was held to lie on the former until the term ended; except for injuries to the reversion. *Williams v. Williams*, L. R. 9 C. P. 659. But where the tenant, being licensed to alter, made alterations beyond what he was justified in doing, it was held that an action lay immediately. *Agate v. Lowenvein*, 57 N. Y. 604. On a covenant to deliver up the leased premises in good condition at the end of the term, the lessee is not liable for an injury to a portable wood-cutting machine found on the premises, though worked by a belt attached

repair and leave the premises in as good state as he found them, and then pulls them down; he is not guilty of a breach of the covenant, for he may rebuild them before he leaves, and therefore no action will lie against him until the end of the term. [So the mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of the covenant to repair and uphold the premises, and deliver them up at the end of the term with all things affixed thereto.¹] A covenant to repair "forthwith," must receive a reasonable construction, and is not limited to any specific time [and it is a question of fact whether the covenantor has done what he ought to have done].² If, therefore, a man covenants to keep a house in repair, and it becomes ruinous by accident, the covenant will not become broken till after a convenient time for its repair has elapsed. And if he engages to repair it before a particular day, and it becomes impossible by the act of God to make the repairs by that day, he will not be liable for a breach of the covenant, if he repairs it as soon as possible thereafter; but the repairs must be made during the term, for if the tenant enters for that purpose after the expiration of the term, he will be a trespasser.³ Where there was a lease for a year of a meadow bounded on one side by a river, and the lessee covenanted to sustain and repair the banks to prevent the water from overflowing the meadow, upon pain of forfeiting a certain sum of money, and afterwards, by a sudden and violent flood, the banks were destroyed, the lessee was excused from the penalty, because it was the act of God which could not be resisted; but he was held bound

to the factory; for it is a chattel and does not pass by a lease which demises the factory and land. *Holbrook v. Chamberlain*, 116 Mass. 161.

¹ *Doe v. Davis*, 1 Ellis & E. 403.

² *Doe v. Sutton*, 9 C. & P. 706. If he agrees to keep the premises in repair during the tenancy, and before the expiration of the term an action is brought against him for a breach of his agreement, the plaintiff is entitled to recover nominal damages only. *Marriott v. Cotton*, 2 C. & K. 558.

³ *Shep. Touch.* 173; *Compton v. Allen*, *Style*, 162; *Main's Case*, 5 Co. 21.

to repair the banks in a convenient time, because of his covenant.¹

§ 362. **General Covenant with Additional Stipulations.**—Where a lease contains a general covenant to keep the premises in repair, with a clause of re-entry for a breach of covenant; and a further covenant that the tenant shall, within a certain time after notice by the landlord, repair all defects specified in the notice, the first covenant will not, in general, be held to be restrained by the latter.² And it has been held that a covenant by the lessee to leave the premises in repair, and a covenant that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, were distinct and separate covenants and that the former was not qualified by the latter.³ But where a lessee covenanted to repair the premises as often as need should require, and, at furthest, within three months after notice, it was held to be an entire covenant, the former part of which was qualified by the latter.⁴ A tenant holding over

¹ Dyer, 33, a; *Walton v. Waterhouse*, 2 Saund. 420, n. (2). A covenant to take down houses within a certain term and erect new ones, may be complied with by completely and substantially repairing without taking down. *Evelyn v. Raddish*, 7 Taunt. 411. Under a covenant to restore premises "to be used as a school" in same condition, etc., "reasonable use and wear thereof as a public school excepted:" the lessees changed the dwelling-house into school-rooms by removing partitions, etc. It was held that they were not bound to restore the premises to their former condition as a dwelling-house. *McGregor v. Board of Education*, 107 N. Y. 511.

² *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 B. & C. 606; *Doe v. Lewis*, 5 Ad. & E. 277. So it was held in *Kling v. Dress*, 5 Rob. (N. Y.) 521, that a covenant to repair, with a clause of re-entry for breach, is not qualified by a covenant to deliver up in the same repair as when taken, damages by elements excepted. But in *Ball v. Wyeth*, 8 Allen, 275, a covenant to repair was held qualified by a covenant to quit and deliver up, etc., wear and tear and casualties excepted.

³ *Wood v. Day*, 7 Taunt. 646. In *Williams v. Williams*, L. R. 9 C. P. 659, a general covenant to repair was treated as consistent with and not qualified by a covenant to repair on three months' notice. A parol agreement by a tenant under a sealed lease, having some years yet to run, to leave buildings on the premises at the end of the term, is void. *Lawrence v. Woods*, 4 Bosw. 354.

⁴ *Horsfall v. Testar*, 7 Taunt. 885.

after the expiration of his term, impliedly holds subject to all the covenants in the lease which are applicable to his new situation; and therefore, if after the expiration of a written lease containing a covenant by the lessee to keep the premises in repair, he verbally agrees to continue tenant, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, and the premises afterwards become ruinous by accidental fire, he is bound to repair them. And a mere advance in the amount of rent to be paid, makes no difference, for the advanced rent incorporates the old terms with the new contract, the parties being supposed in other respects to have had reference to the old lease; and there is an implied *assumpsit* raised by the continual holding, although an action would not lie on the covenant.¹

§ 363. **Covenant valid though contained in Void Lease.**— The same principle applies to a void lease, for the tenant [in occupation] is still bound by a covenant to repair, although the agreement under which he holds may be void, or contrary to the Statute of Frauds. Thus, where a lease was granted by a tenant for life under a power, containing a covenant to repair but not made in accordance with the power, and the lease was assigned to the defendant, who, after the death of the tenant for life, when the lease would terminate, continued to pay rent to the remainder-man for a short period; the premises being left out of repair, the landlord brought an action for damages against such assignee, on an implied *assumpsit* to repair; and it was held he was entitled to recover up to the end of the term mentioned in the lease, on the ground that the tenant was liable upon all the stipulations contained in the lease as a tenant is who holds over after the determination of the lease. But if a breach of the covenant to repair takes place during the continuance of the lease, persons claiming under the lessee, and coming into possession after the determination of the lease, will not be liable on an implied promise, to restore

¹ Digby v. Atkinson, 4 Camp. 275; Kimpton v. Eve, 2 Ves. & B. 353; Brudnell v. Roberts, 2 Wils. 143.

the premises to the same state in which they were at the commencement of the original lease.¹

§ 364. **Under Express Covenant, Tenant liable for Accidental Injury or Destruction.** — Under an express covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and even if the premises are entirely consumed, he is still bound to repair within a reasonable time.² And the principle applies to all damages occasioned by a public enemy, or by a mob, flood, or tempest.³ Thus where the covenant is "to repair" in general terms, or "to repair, uphold, and support," or however otherwise phrased, if it prescribes the duty of repair, it binds the lessee to rebuild if the premises are destroyed.⁴ For this reason, and in order to

¹ *Beal v. Saunders*, 3 Bing. N.C. 850; *Johnson v. St. Peter's Hereford*, 4 Ad. & E. 520. Breaking a doorway through the wall of the demised premises into the adjoining house, and keeping it open for a long time, is a breach of a covenant to keep in repair. *Doe v. Jackson*, 2 Stark. 260. But in a long lease this covenant is not broken by the tenant's making alterations. *Doe v. Jones*, 4 B. & Ad. 126.

² *Bullock v. Dommitt*, 6 T. R. 650; *Phillips v. Stevens*, 16 Mass. 238; *Pym v. Blackburn*, 3 Ves. 38; *Walton v. Waterhouse*, 2 Saund. 420, n. (2); *Chesterfield v. Bolton*, Com. 627; *Wainscott v. Silvers*, 13 Ind. 497. See §§ 360, *ante*, 375, *post*.

³ *Paradine v. Jane*, Allyn, 26; *Bullock v. Dommitt*, *supra*; *Phillips v. Stevens*, *supra*; *Bohannons v. Lewis*, 3 T. B. Monr. 370.

⁴ *Beach v. Crain*, 2 N. Y. 86. Thus where it was to "keep in repair, and leave as found:" *Phillips v. Stevens*, 16 Mass. 238; *Pym v. Blackburn*, 3 Ves. 34, 38; *Bigelow v. Collamore*, 5 Cush. 231; *Ely v. Ely*, 80 Ill. 532; to "deliver in tenantable repair:" *Ross v. Overton*, 3 Call. 309; to "make all necessary repairs:" *Myers v. Burns*, 33 Barb. 401; *Beach v. Crain*, *supra*; *Leavitt v. Fletcher*, 10 Allen, 119; to "repair and keep in repair:" *Green v. Eales*, 2 Q. B. 225; to "keep in good repair:" *Tilden v. Tilden*, 13 Gray, 103, 109; *Cline v. Black*, 4 McCord, 431; *Cowell v. Lumley*, 39 Cal. 151; "except wear and tear:" *McIntosh v. Lown*, 49 Barb. 550; or "well and sufficiently to repair, support, uphold, &c., &c.:" *Digby v. Atkinson*, 4 Camp. 275; *Walton v. Waterhouse*, 2 Saund. 420. In *Warner v. Hitchins*, 5 Barb. 666, it was held that a covenant to "surrender up in same condition as at date of the lease," did not bind the lessee to rebuild, as the covenant looked not to repair, but redelivery. So *Horwitz v. Anderson*, 25 Tex. 557. In *McIntosh v. Lown*, 49 Barb. 550, 555, it was held that a covenant to "repair and leave in same repair as at

protect the tenant, it is customary to introduce into the covenant to repair, an exception against accidents by fire, tempest, or lightning. [An exception as to "damages by the elements," in the lessee's covenant to keep in repair, covers destruction by fire occurring without the lessee's fault; for in the popular acceptation of the phrase, injuries by the elements are such as result from the operation of the most common destructive forces of nature, and of these fire is the chief.¹ It is held that if a building, a portion of which is leased "during the life of the building," is so injured by fire as to substantially destroy the part demised and to render it impracticable for the lessee to perform his covenant to rebuild such part, except by rebuilding other important parts of the building not included in the demise, the "life of the building" may be said to have been terminated within the meaning of the lease.²]

§ 365. **May be apportioned among Assignees of the Reversion.** — As this is a covenant running with the land and binding the assignee of the reversion, it may be apportioned among the assignees of different parts of the reversion.³ An equitable assignee is also liable in equity to the lessee to repair all damages which have occurred during his occupation;⁴ and an assignee by way of mortgage is equally liable, although he never takes possession.⁵ Formerly, a mere depositary of a lease by way of mortgage, whether he had entered into possession of the premises or not, was compelled to take an actual assignment, and so clothe himself with the legal estate and its consequent liabilities;⁶ but the consequences of this doctrine to the mercantile community, who are in the habit of taking deposits of leases as security for date of lease," did not bind lessee to rebuild. But see cases cited, *supra*, and *Kramer v. Cook*, 7 Gray, 550, 553; *Jacques v. Gould*, 4 Cush. 384, 388.

¹ *Van Wormer v. Crane*, 51 Mich. 363, per Cooley, J.

² *Ainsworth v. Mt. Moriah Lodge*, 172 Mass. 257.

³ §§ 260, 262, 357, *ante*; *Badeley v. Vigurs*, 4 Ellis & B. 71.

⁴ *Close v. Wilberforce*, 1 Beav. 112; *Willson v. Leonard*, 3 *id.* 373.

⁵ *Pilkington v. Shaller*, 2 Vern. 374.

⁶ *Lucas v. Commerford*, 1 Ves. 235; s. c. 3 Bro. C. C. 166, cited in *Flight v. Bentley*, 7 Sim. 153.

temporary loans, caused the question to be reviewed, when it was determined that, although the lessor may consider the depositary of the lease its equitable assignee, yet that he has no equity to compel him to take an assignment of the lease, or to oblige the depositor to assign it.¹ Nor will the court compel an equitable assignee, at the suit of the lessor, to discover whether the lease has been assigned to him, for the purpose of forcing him to perform the covenants therein.²

§ 366. **Covenant to insure. — Effect of Eviction.** — Where there is, besides a covenant to repair, a covenant to insure for a certain sum, and the premises are burned, the lessee's liability to rebuild is not limited to the amount for which he agreed to insure.³ Nor has the tenant any equity to compel his landlord to expend money received from an insurance company in rebuilding the demised premises, on their being burnt down, or to restrain the landlord from suing for the rent, until after the premises shall have been rebuilt.⁴ An eviction by elder title will absolve the lessee from a covenant to repair, for the land being gone, the covenant is annulled.⁵ But an eviction from part of the thing demised is not a defence to an action for a breach of this covenant, unless the lessee has been evicted from that part of the land where the repairs were to be done, and so prevented from fulfilling his covenant.⁶ The general covenant of the lessee to repair extends to all buildings erected during the term, as well as to those demised; if, therefore, upon a demise of three houses with such a covenant, the lessee builds a fourth, he will be bound to repair this also.⁷

§ 367. **Reciprocal Duties of Cotenants under. — Tenant at Will liable only for Waste.** — As between cotenants, both equally

¹ *Moore v. Choat*, 8 Sim. 508; *Jenkins v. Portman*, 1 Keen, 435.

² *Sparkes v. Smith*, 2 Vern. 275.

³ *Digby v. Atkinson*, 4 Camp. 275.

⁴ *Leeds v. Cheetham*, 1 Sim. 146; *Ely v. Ely*, 80 Ill. 532.

⁵ *Andrews v. Needham*, Noy. 75; s. c. Cro. El. 656.

⁶ *Carrell v. Reed*, Cro. El. 374; *Snelling v. Stagg*, Bull. N. P. 165; *Morrison v. Chadwick*, 7 C. B. 266; *Newton v. Allin*, 1 Q. B. 518.

⁷ *Douse v. Earle*, 3 Lev. 264.

bound to repair, or to support a partition wall or fence, the rule is that either party, if the other refuses to join him in making a necessary repair, may, after giving reasonable notice, proceed to do what is necessary to be done, and charge his cotenant with his proportion of the expense. And if there had once been a division fence between them, which one party has improperly removed, without giving to the other the notice of his intention to let the land lie open required by statute, he is liable not only for his proportion of the expense of making a new fence, but also to all damages sustained by the other party in consequence of such removal.¹ But, as between a tenant and his landlord, if a tenant under a covenant to repair, pulls down a party-wall (being in a ruinous condition), and rebuilds it, intending to do so at the joint expense of himself and the occupant of the adjoining house, to whom he gave the notice required by statute, but without the landlord's authority; he cannot maintain an action against his landlord for a moiety of the expense of rebuilding.² The estate of a tenant at will being uncertain, the law imposes no obligation upon him for dilapidations; the landlord has, therefore, no remedy against such a tenant except for wilful waste, in which case, as we have seen, he forfeits his interest in the estate. He is not bound to repair, and takes no charge upon himself but to occupy and pay rent.³

§ 368. **Measure of Damages for Breach of.** — The former rule as to the measure of damages for non-repair was the cost of putting them into the condition of repair contemplated by the covenant⁴ [and this is still the true rule in actions brought after the end of the term.⁵ It seems that compensation may

¹ 3 Kent, Com. 352; *Richardson v. McDougall*, 11 Wend. 46. The owner of a room on the lower floor of a dwelling-house and the cellar under it is not liable to the owner of the chamber over it, and of the rest of the house, for necessary repairs to the roof. *Loring v. Bacon*, 4 Mass. 575.

² *Pizey v. Rogers*, Ry. & M. 357.

³ *Salop v. Crompton*, Cro. El. 777; Co. Lit. 71.

⁴ *Vivian v. Champion*, 2 Ld. Ray. 1125; *Penley v. Watts*, 7 M. & W. 601.

⁵ *Joyner v. Weeks*, 1891, 2 Q. B. 31; *Burke v. Pierce*, 55 U. S. App.

also be allowed for the landlord's loss of occupation while the repairs are going on,¹ and that the tenant is to be allowed for reasonable use and wear, and for increase in value by substituting new material for old.² There are cases which hold that the measure of damages is the injury to the market value of the reversion,³ but this rule is to apply, if at all, in actions on the covenant which are brought before the expiration of the term].⁴ Where the lessor was bound by covenant to repair "the external parts of a demised house," which was damaged in consequence of the adjoining house being pulled down and the party-wall giving way, the jury awarded as damages the sum which the lessor had laid out in building the party-wall, the value of certain damage done by the wall giving way, the cost of painting and papering, rendered necessary by the rebuilding of the wall, the cost of replacing fixtures, and the architect's charges; and, also, the rent he had paid for other premises whilst the wall was rebuilding, besides the cost of such alterations as were necessary to enable him to carry on his business in these latter premises, and the cost of restoring those premises to their original state after the wall was rebuilt. On appeal, it was held that the plaintiff was not entitled to these three latter items of damage; because, if the defendant had rebuilt the wall, he would not have been bound to find other premises for the plaintiff during the time the wall was rebuilding.⁵ If the action is brought during the term, and it

59; *Darlington v. De Wald*, 199 Pa. St. 305; *Webster v. Nossor*, 2 Daly, 186; *Watriss v. Cambridge Nat. Bank*, 130 Mass. 343, where the authorities are collected.

¹ *Woods v. Pope*, 1 Bing. N. C. 467.

² *Watriss v. Cambridge Nat. Bank*, *supra*; *Yates v. Dunster*, 11 Exch. 15.

³ *Coward v. Gregory*, L. R. 2 C. P. 153; *Mills v. E. London Union*, L. R. 8 C. P. 79; *Doe v. Rowlands*, 9 C. & P. 734; *Turner v. Lamb*, 14 M. & W. 412; *Young v. Mantz*, 6 Scott, 277.

⁴ *Watriss v. Cambridge Nat. Bank*, *supra*. Since under the ordinary general covenant to return the premises in repair the tenant is entitled to the whole term in which to make repairs, an action brought on such a covenant before the end of the term is premature. *Fratt v. Hunt*, 108 Cal. 288.

⁵ *Green v. Eales*, 2 Q. B. 225. A question as to damages recoverable under a covenant to repair arises where there is a lease and an under-

appears that the premises were out of repair when the action was commenced, the lessor is still entitled to nominal damages, although the lessee has since put the premises in repair.¹

SECTION II.

OF THE COVENANT TO PAY RENT.

§ 369. **Rent defined. — Whence it issues.** — Rent is a certain profit, either in money, provisions, chattels, or labor, issuing yearly out of lands and tenements, in return for their use. [It is a sum to be paid to the landlord clear of all deductions,² and is to be settled as of the date of the demise. Thus where the rent of a mine is so much per bushel of screened coal, the amount to be paid as rent depends on the size of screens at the date of the lease, although the lessee's business may require these to be altered during the term of lease. Where a right to mine ore or other minerals is granted in consideration of the reservation of a certain proportion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine properly and diligently,³ and this rule applies where the rent is in form of a royalty upon the product of a mill or mine.⁴] Some of the properties of rent, at common law, are certainty, or the power of being reduced to a certainty by either party; and that it be a yearly issue, for lease, both of which contain such a covenant, and the superior landlord has sued the lessee on his covenant. *Colley v. Streeton*, 2 B. & C. 273. In *Neale v. Wyllie*, 3 B. & C. 533, it was held that in such case the damages and costs recovered in that action, and also the costs of defending it, might be claimed as special damage in an action by the lessee, against the under-lessee, for the breach of his covenant to repair. This decision was doubted in *Penley v. Watts*, 7 M. & W. 601, so far as relates to the costs of the first action, and was overruled in *Walker v. Hatton*, 10 M. & W. 249, where it was held that the costs occasioned by the defence of the first action were not recoverable against the under-lessee, being not necessarily caused by his breach of covenant. See *Smith v. Howell*, 6 Exch. 730; *Pennell v. Woodburn*, 7 C. & P. 117; *Short v. Kalloway*, 11 Ad. & E. 28; *Blyth v. Smith*, 5 Mann. & G. 405.

¹ *Moroney v. Ferguson*, 8 Ir. R. C. L. 551.

² *Bennett v. Womack*, 7 B. & C. 627, 3 C. & P. 96.

³ *Koch & Balliet's Appeal*, 93 Pa. St. 434.

⁴ See *People v. Loomis*, 27 Hun, 328; § 17 *a*, *ante*.

although it need not issue out of each successive year, yet, as it is to be produced out of the profits of lands and tenements, as a compensation for their enjoyment, it must be renewed yearly, because such profits arise and are renewed annually. It must issue out of the thing demised, and not be part of the thing itself; and necessarily, issues out of lands and tenements corporeal merely, for out of such only can the lessor distrain.¹ It must be originally reserved to the lessor, and is incident to and follows the reversion. It may be afterwards apportioned upon different parcels of the land, and assigned to several parties so as to give to each a right of action in his own name. And if to accrue, it may be severed from the reversion, and assigned by the lessor to other persons, the lessor reserving the reversion to himself.²

§ 370. **Different Kinds of Rent.** — **Each defined.** — There are at common law, three kinds of rent: *rent-service*, *rent-charge*, and *rent-seck*. Rent-service was so called because it had some corporeal service incident to it; as, if a tenant held his lands by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent; and these pecuniary rents were always annexed to and connected with a reversionary estate remaining in the grantor.³ To this species of rent the right of distress was incident so long as the reversion remained in the landlord. A rent-charge was where the proprietor parted with the fee of his land, but by the grant reserved to himself a certain rent, with a clause authorizing its collection by distress, and it was called a rent-charge because the lands were charged with such distress only by force of the deed, and not of common right;⁴ while

¹ Co. Lit. 47, a; 142, a; *Merritt v. Fisher*, 19 Iowa, 354. But the courts of Pennsylvania have held that rent, as such, flows from chattels parcel of the demise.

² *Van Rensselaer v. Hays*, 19 N. Y. 68; *Childers v. Smith*, 10 B. Monr. 235; *Ryerson v. Quackenbush*, 26 N. J. 236.

³ Where the lease was for ninety-nine years with covenant for perpetual renewal at a fixed yearly rent, it was held that the rent reserved was a rent-service, and so apportionable upon the lessee's surrender to the grantee of the reversion of a portion of the land. *Ehrman v. Mayer*, 57 Md. 612.

⁴ Of this kind was the rent on the so-called "Manor leases" in New

a rent-seck, or barren rent, was nothing more than a rent reserved by deed, without any right of distress, and which could only be collected by an ordinary action of debt.¹ The difference between these various species of rent, so far at least as regards the remedy for their recovery, has now disappeared [since where the statute has not abolished distress for rent a landlord may distrain] for any certain services, or certain rent unpaid, reserved out of any lands or tenements.²

§ 371. **Express Covenant usual, but Covenant always implied.**— Besides the reservation of rent in the demise, a special covenant for its payment is usually inserted;³ but, in all cases, the law will imply a promise on the part of a tenant to pay the landlord for his permission to occupy the premises, as much as they are reasonably worth; which obligation is incumbent upon the occupant so long as he continues to hold, without obstruction by the landlord. But although a lessee, during

York; because by the statute 1787, embodying the principles of the statute *quia emptores*, the rent reserved therein (the demise being in fee) was not considered a rent-service. See *Van Rensselaer v. Hays*, 19 N. Y. 68; *Same v. Read*, 26 N. Y. 558, where it is held that conveyances in fee, under a rent-charge, operate as assignments and not as leases, and leave no reversion in the grantors, and that such a rent is a hereditament, assignable and devisable; and see §§ 261, 285, *ante*. But such a rent comes, within the statutory provisions concerning rents. *Van Rensselaer v. Witbeck*, 2 Lans. 498. On similar demises in fee in Pennsylvania, the rent is held to be a rent-service, since the statute *quia emptores* was never in force there. It is called a ground rent or fee-farm rent, and forms a lien on the land superior to conveyances by the tenant. *Brown v. Johnson*, 4 Rawle, 146. The popular objections to the "Manor leases," were examined, and the anti-rent movement in New York discussed, by Hon. D. D. Barnard, in the "North American Review" for December, 1845.

¹ *People v. Haskins*, 7 Wend. 463; *Cuthbert v. Kuhn*, 3 Whart. 357; *Cornell v. Lamb*, 2 Cow. 652; Litt. § 217.

² 4 Geo. II. c. 28; 1 R. S. 747, § 18; 8 Kent, Com. 461, n., b.

³ Sometimes a mortgage is inserted in a lease, of the lessee's chattels upon the demised premises, as security for the rent. This is good as a mortgage of property on the premises at the time of making the lease; but, as to property which thereafter be brought upon the premises is held void, as against the policy of an act to abolish distress for rent. *Van Heusen v. Radcliff*, 17 N. Y. 580.

his occupation, or an assignee while his enjoyment lasts, may, without a covenant, be compelled to pay rent,¹ yet, in the absence of the covenant, he may, by assigning over, discharge himself of future responsibility.² And, as the premises might be transferred to a beggar,³ an insolvent,⁴ or to a person leaving the country (provided the assignment be executed before his departure), the lessor would, to a certain extent, lose his security for the rent.⁵ For these reasons, a covenant to pay rent is generally contained in every indenture of lease. And as the liability of a lessee on this covenant is not impaired or affected by his never taking possession,⁶ or by his act of assigning over the lease, but remains valid against him and his executors until the end of the lease,⁷ the covenant, in the event of a tenant's alienation, affords the landlord a double claim for the payment of his rent; the assignee being chargeable in consequence of his privity of estate, and the original lessee still continuing bound in respect to his contract. This is a covenant running with the land, binding on an assignee of the lease, without his being specially named,⁸ and, in the

¹ § 154, *ante*; §§ 442-447, *post*. In Nebraska, under code, § 1021, a refusal of the tenant to pay rent according to the terms of the lease terminates the lease, in the absence of contrary stipulations, and renders the tenant liable to an action of forcible detention. *Pollock v. Whipple*, 33 Neb. 754; see *Hendrickson v. Beeson*, 21 Neb. 6.

² *Pitcher v. Tovey*, 4 Mod. 71, 12 Mod. 23; *Treackle v. Coke*, 1 Vern. 165; *Staines v. Morris*, 1 V. & B. 11.

³ *Taylor v. Shum*, 1 B. & P. 21.

⁴ *Onslow v. Corrie*, 2 Madd. 330.

⁵ *Dalston v. Reeve*, 1 Ld. Ray. 77; *Webb v. Russell*, 3 T. R. 402; *Iggulden v. May*, 9 Ves. 330.

⁶ *McGlynn v. Brock*, 111 Mass. 219; *Mech. & Tr. Ins. Co. v. Scott*, 2 Hilt. 550.

⁷ *Pitcher v. Tovey*, 1 Salk. 81; *Buckland v. Hall*, 8 Ves. 95; *Snyder v. Middleton*, 4 Phila. 343; *Harmony Lodge v. White*, 30 Ohio St. 569; *Taylor v. De Bus*, 31 *id.* 468; *Field v. Herrick*, 101 Ill. 110. The obligation of a lessee is primary and absolute, and that of a guarantor secondary and conditional; and these obligations are separate and not joint, and will not support a joint action by the lessor against the lessee and the guarantor, when in separate instruments. *Tibbits v. Percy*, 24 Barb. 39.

⁸ *Main v. Feathers*, 21 Barb. 646; *Dolph v. White*, 12 N. Y. 296; *Jones v. Barnes*, 45 Mo. App. 590.

case of an indenture executed by the lessee, will arise upon the ordinary words of reservation, "yielding and paying."¹ But it is held that the words, "subject to payment of the rent reserved," in an assignment of a lease, do not amount to a covenant, and give no right of action against the assignee; for they are words of qualification and not of contract.² [An assignment, by the lessor, of the rent of leasehold premises, creates such a privity of estate between the assignee and the lessee, that the former may maintain a suit in his own name for the rent which accrues and becomes payable while such privity of estate exists.³]

§ 372. **Express Covenant, Effect of.** — When the relation of landlord and tenant has been once established [under the express covenant], the tenant cannot resist a demand of rent, unless he has been evicted by the landlord, or otherwise legally entitled to quit possession; and has done so in an unqualified manner; or unless the landlord has accepted another as tenant in his stead.⁴ [The fact that the title to the premises is in dispute and undetermined is not a defence to an action on the covenant for rent.⁵ And a tenant is not to be permitted to avoid his contract on the ground of fraud, and yet retain possession of the premises.⁶] No accident to the demised property, or misfortune to the lessee through the casualties of war or otherwise, will relieve the tenant from his express covenant. In an ancient case, the tenant objected, as a reason why he should not pay rent, that Prince Rupert, an alien, with a hostile army, had driven him out of his possession; but it was considered that, though the whole army had

¹ *Holford v. Hatch*, 1 Doug. 188; *Vyvyan v. Arthur*, 1 B. & C. 416.

² *Wolveridge v. Steward*, 3 Tyrw. 637, 1 Cr. & M. 644. It was agreed that the lessee should spend £200 in repairs to be inspected and approved of by the lessor, the lessee to retain the sum out of the rent. Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. *Dallman v. King*, 4 Bing. N. C. 105.

³ *Childs v. Clark*, 8 Barb. Ch. 52.

⁴ *Ward v. Mason*, 9 Price, 294; *Dyer v. Wightman*, 66 Pa. St. 425; *Snyder v. Middleton*, *supra*; *Cleves v. Willoughby*, 7 Hill, 88.

⁵ *Moffat v. Snyder*, 13 Tex. 628.

⁶ *McCarty v. Ely*, 4 E. D. Smith, 375.

been alien enemies, he was bound to pay his rent because he had expressly covenanted to that effect.¹ And, if the land be surrounded or gained upon by the sea, or in any other way rendered useless, still, as the lessee is to have the advantage of all profits, he must run the hazard of casual losses, and will be liable for the whole rent.² And, though the premises may be destroyed by unavoidable accidents of fire, flood, or tempest,³ the tenant is still liable at common law to pay rent under his express covenant, notwithstanding their ruinous condition.⁴

¹ *Paradine v. Jane*, Aleyn, 26. To the same effect are *Wagner v. White*, 4 Har. & J. 564; *Kramer v. Cook*, 7 Gray, 550; *Coy v. Downie*, 14 Fla. 544. But it was held in South Carolina, that where a tenant has been dispossessed by an enemy, he ought to pay rent only for the time he had peaceably enjoyed. *Bayley v. Lawrence*, 1 Bay, 499.

² *Richard le Taverner's Case*, Dyer, 56, a; *Peck v. Ledwidge*, 25 Ill. 109. So held also in respect to a wharf which was partially destroyed by natural decay. *Hill v. Woodman*, 14 Me. 38.

³ *Hallett v. Wylie*, 3 Johns. 44; *Fowler v. Bott*, 6 Mass. 63; *Linn v. Ross*, 14 Ohio, 412; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662; *Monk v. Cooper*, 2 Ld. Ray, 1477; *Balfour v. Weston*, 1 T. R. 310; *Medwin v. Sandham*, 3 Swanst. 685. In *Ripley v. Wightman*, 4 McCord, 447, it was held that, where a hurricane rendered a house untenable, this was a good defence to an action for rent. But this case, as well as *Bayley v. Lawrence*, *supra*, are evidently opposed to the rule that when a man takes a charge upon himself, by his own agreement or covenant, he is liable in damages resulting from non-performance, although performance should become impossible. The rule is otherwise where the law creates a duty or implies a liability, for there the party is discharged from the obligation, if the performance becomes impossible.

⁴ *Monk v. Cooper*, 2 Stra. 763; *Holtzapffel v. Baker*, 18 Ves. 115; *Hare v. Groves*, 3 Anstr. 687; *Arden v. Pullen*, 10 M. & W. 321; *Trench v. Richards*, 6 Phila. 547; *Cowell v. Lumley*, 39 Cal. 151; *Warren v. Wagner*, 75 Ala. 188; *Harrison v. Lord North*, 1 Ca. in Ch. 83; *Richard le Taverner's Case*, *supra*. So where rent is paid in advance: *Diamond v. Harris*, 33 Tex. 134; *Cross v. Button*, 4 Wis. 468, or the lessor has collected the insurance-money and refuses to rebuild. *Bussman v. Ganster*, 72 Pa. St. 285. And the guarantor of the lessee is equally held. *Kingsbury v. Westfall*, 61 N. Y. 356. In England and Kentucky the same rule is applied to the tenant of a part of a house, *Izon v. Gorton*, 5 Bing. N. C. 501; *Helburn v. Mofford*, 7 Bush, 169; but the American law is otherwise: § 520, *post*. As to statutory modifications of the common-law rule, see § 375, *post*.

§ 373. **Express Covenant strictly construed.** — Covenants implied by operation of law admit of a more liberal construction, and may be moulded according to the dictates of reason and justice; but express covenants are to be construed strictly, and the person contracting not only assumes to do the thing stipulated, but takes on himself all risk of performance.¹ An exception of casualties by fire, introduced into the covenant to repair, will not change the case, since the exception has no relation to the covenant to pay rent.²

§ 374. **Recoupment in Action on Covenant to pay Rent.** — According to the ancient law, a tenant could not, in a suit for rent, set up in defence that the landlord had broken his covenant to repair; because these covenants are independent. The damages sustained by the tenant being also uncertain, could only be made the subject of a cross-action, and were, therefore, incapable, technically, of being set off against the demand for rent, which is a certain fixed amount.³ But it is now generally considered that a defendant need not resort to a cross-action on the plaintiff's contract of indemnity in any case, but may set up his damages or counter-claim, by way of extinguishing or reducing the plaintiff's demand. If the demands of both parties issue out of the same contract or transaction, the defendant is allowed to recoup,⁴ although

¹ Warren v. Powers, 5 Conn. 381; Bohannon v. Lewis, 3 T. B. Monr. 876.

² Belfour v. Western, 1 T. R. 310; Pindar v. Ainsley, *id.* 312; Doe v. Sandham, *id.* 710. See Leavitt v. Fletcher, 10 Allen, 119. A lease contained a covenant to pay rent on the usual quarter days, and a proviso for re-entry "if and whenever" any one quarter's rent should be in arrear for twenty-one days and no sufficient distress could be levied. It was held, that the effect of the words "if and whenever" was to give the lessor a right of re-entry as often as at any moment of time the two conditions named in the proviso existed. Shepherd v. Berger, 1891, 1 Q. B. 597.

³ Watts v. Coffin, 11 Johns. 495; Weigall v. Waters, 6 T. R. 488. In an action on the covenant to pay rent, the lessee cannot *set off* his claim on the lessor's covenant to pay him for improvements at the end of the term. Tuttle v. Tompkins, 2 Wend. 407. Nor the interest due on the lessor's mortgage to him. Scott v. Fritz, 51 Pa. St. 418. As to set-off of demands for rent, see § 329, *ante*, § 630, *post*.

⁴ Ives v. Van Epps, 22 Wend. 165; Westlake v. Degraw, 25 *id.* 669;

the damages on both sides are unliquidated; but he can *set off* only where the demands of both parties are liquidated, or capable of being ascertained by calculation. It was formerly supposed that there could only be a recoupment where some fraud was imputed to the plaintiff in relation to the contract on which the action was founded; but the doctrine is now applied to cases where the defendant complains only that there has been a breach of contract on the part of the plaintiff. And, for the purpose of avoiding circuitry, or multiplicity of action, they may adjust all their claims growing out of the same contract in one action. The defendant may elect whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action. But whatever his damages, he can only set them up by recoupment to abate in whole or in part, the plaintiff's demand; he cannot, as in set-off, go further, and have a balance certified in his favor. And if a plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time, and relating to the same subject-matter, the defendant may recoup his damages arising from the breach of another part; and this, whether the different parts be contained in one instrument or in several, or where one part is in writing and the other verbal, or whether the damages are liquidated or not.¹ [It is held that if there was

Reab v. McAlister, 8 *id.* 109. But it seems that where money is deposited to secure rent, damages for breach of the covenant to repair may be set off against it and the balance, if any, awarded to the tenant. *Scott v. Montells*, 109 N. Y. 1. It is a result of the general rule stated that damages for a tort, as for malicious prosecution, cannot be set off or recouped in an action for rent and for use and occupation. *Dietrich v. Ely*, 24 U. S. App. 21. So, under the civil law, damages for the wrongful conduct of the lessor, in seeking to obtain possession of the leased premises, cannot be claimed by reconvention in a suit by the lessor for possession. *Ward v. Stakelum*, 47 La. An. 1546.

¹ *Batterman v. Pierce*, 3 Hill, 171; *Ives v. Van Epps*, *supra*; *Van Epps v. Harrison*, 5 Hill, 63; *Barber v. Rose*, *id.* 76; *Whitbeck v. Skinner*, 7 *id.* 53; *Nichols v. Dusenbury*, 2 N. Y. 283; *Mayor v. Mabie*, 13 *id.* 151; *Wright v. Lattin*, 38 Ill. 293; *Lunn v. Gage*, 37 *id.* 19; *Myers v. Burns*, 35 N. Y. 269. In *McBride v. Daniels*, 92 Pa. St. 332, the lessor was permitted to recoup damages arising from a breach of the tenant's covenant to leave the premises in good condition, in the tenant's action for the price of crops taken by the lessor at a valuation fixed in

fraud or misrepresentation by the landlord in the making the lease by which the lessee suffered damage, he may recoup this in an action for the rent.¹]

the lease. In California the tenant cannot counterclaim in the statutory action for unlawful detainer. *Van Every v. Ogg*, 59 Cal. 563; *Kelly v. Teague*, 63 *id.* 68. In New Jersey it seems that recoupment is not permitted as between landlord and tenant. *Hunter v. Reiley*, 14 Vroom, 480. Recoupment is in the nature of a cross action for an unliquidated amount. A defence therefore which is pleadable in bar, like eviction, is not available by way of recoupment, *Nichols v. Dusenbury*, 2 N. Y. 283; *Dunwoody v. Raynor*, 52 Pa. St. 292, unless it be made so by statute. See *McKesson v. Mendenhall*, 64 N. C. 286; *Mostyn v. W. M. Coal Co.*, 1 L. R. C. P. Div. 145; *Holbrook v. Young*, 108 Mass. 83, 85; *Grabenhorst v. Nicodemus*, 42 Md. 236, where the same defence was regarded as either eviction or recoupment, and see *Livingston v. L'Engle*, 27 Fla. 502. Where the landlord's acts or defaults in respect of the demised estate go to diminish the tenant's enjoyment of it, they may be the subject of recoupment. As for depriving the tenant of an easement: *Depuy v. Silver*, 1 Clark, Pa. 385; or of the use of an adjoining well: *Lynch v. Baldwin*, 69 Ill. 310; or for removing a fence around the premises: *Abrams v. Wilson*, 59 Ala. 524; or for breach of a covenant to heat: *Elwood v. Forkel*, 35 Hun, 202; or to make improvements: *Pioneer Press Co. v. Hutchinson*, 63 Minn. 481; or failure to repair: cases *supra*; *Block v. Ebner*, 54 Ind. 544; *Leach v. Leach*, 10 *id.* 271; *Fairman v. Fluck*, 5 Watts, 516; *Smart v. Allegaert*, 14 Phila. 179; *Breese v. McCann*, 52 Vt. 490; *Kiernan v. Germain*, 61 Miss. 498; *Culver v. Hill*, 68 Ala. 66; *Lewis v. Chisholm*, 68 Ga. 40; *Spencer v. Hamilton*, 113 N. C. 49; *Hausman v. Mulheran*, 68 Minn. 48. It is held that the tenant's damages in such a case will be limited to the amount which it would have cost him to repair. *Varner v. Rice*, 39 Ark. 344; but see *Green v. Bell*, 3 Mo. App. 291; *Vandegrift v. Abbott*, 75 Ala. 487. In *Norris v. Tharp*, 65

¹ *Barr v. Kimball*, 43 Neb. 766, and see *Pryor v. Foster*, 30 N. Y. 171. It seems that in the landlord's action for waste the tenant may counterclaim for personal property placed by him on the premises which the landlord has converted. *Gilbert v. Loberg*, 86 Wis. 661. See § 688, *post*. It is held that the landlord may have assumpsit against the tenant to recover for the tenant's beneficial use of the premises in excess of the damage which he has suffered by the breach of the landlord's covenant. *Meredith Mechanic's Ass'n v. Am. Twist Drill Co.*, 67 N. H. 450. In an action by a lessor, alleging breaches by the lessee of a written contract of lease, which appears on its face to be complete, the lessee will not be permitted to prove, in counterclaim or recoupment, a contemporaneous parol agreement by the lessor to ditch the land embraced in the lease. *Diven v. Johnson*, 117 Ind. 512.

§ 375. **Tenant bound by Express Covenant although Tenement is destroyed by Fire.** — That a tenant is bound to continue to pay rent after the destruction of the tenement by fire or other external violence, and has no relief against an express covenant to pay rent, is, therefore, generally true, when he has not protected himself by a saving clause in the lease.¹ [And in order to an application of the rule possession must have been delivered to the tenant under the lease, for such delivery is a condition precedent to the landlord's right to collect rent.²] It was early settled that a lessee, not so

Ind. 47, where the lessor had fraudulently represented that the property was fit for the lessee's purposes, it was held that the lessee might counterclaim the damages thereby occasioned him in the lessor's action for the consideration of the lease. In some States acts of trespass are not regarded as growing out of the contract of demise: *Bartlett v. Farrington*, 120 Mass. 284; even when the action is for use and occupation: *De Witt v. Pierson*, 112 *id.* 8; and see *Edgerton v. Page*, 20 N. Y. 281; though an action for a breach either of the covenant of quiet enjoyment, or that of repair, would seem to lie, the court saying, in *Holbrook v. Young*, 108 Mass. 85: "He may set up by way of recoupment damages suffered by reason of the breach of any covenant in the same instrument on the part of the lessor." See *Keegan v. Kinnare*, 123 Ill. 280. Where the rent was appropriated to a third party before the lease, *Ardesco Oil Co. v. N. A. Oil Co.*, 66 Pa. St. 375; or is held *in alieno jure*; *Singerly v. Fox*, 75 *id.* 112, no recoupment or set-off can arise.

¹ *Gates v. Green*, 4 Paige, 355; *Welles v. Castles*, 3 Gray, 323; *Gibson v. Perry*, 29 Mo. 245; *Procter v. Keith*, 12 Ky. 252; *Holtzapffel v. Baker*, 18 Ves. 115; s. c. 4 Taunt. 45; *Leeds v. Cheetham*, 1 Sim. 146; *Lamott v. Sterett*, 1 Har. & J. 42; *Philips v. Stevens*, 16 Mass. 240; *Howard v. Doolittle*, 3 Duer, 464; *Cross v. Button*, 4 Wis. 468; *Ely v. Ely*, 80 Ill. 532; *Harris v. Heackman*, 62 Iowa, 411; *Lewis v. Chisholm*, 68 Ga. 40; *Mayer v. Morehead*, 106 *id.* 923; *Armstrong v. Maybee*, 17 Wash. 24; *Felix v. Griffiths*, 56 Ohio St. 39. In Kansas, it is doubted whether the common-law rule is in force. *Whitaker v. Hawley*, 25 Kan. 674, opinion by Brewer, J. The doctrine of this case is approved in Nebraska. *Wattles v. Omaha Ice & Coal Co.*, 50 Neb. 261. See *Ripley v. Wightman*, 4 McCord (s. c.), 447. As to the *dicta* that the lessor's covenant to rebuild is a condition precedent to rent, see § 331, n., *ante*. But where the lessee insures agreeing to rebuild, and, at the lessor's request gives him the money, the lessor must rebuild before he can recover rent. *Boyer v. Dickson*, 7 Phila. 190. Where a building upon leasehold premises is destroyed by fire, there is no obligation upon either party to rebuild, in the absence of covenants in the lease requiring it. *Smith v. Kerr*, 108 N. Y. 81.

² *Wood v. Hubbell*, 10 N. Y. 479.

protected by a saving clause, could not be relieved from the performance of his covenant to pay rent, either at law or in equity.¹ It is to be observed that all such cases depend upon the general rule that, when the law creates a duty or charge, and the party is disabled from performing it, without his fault, and he has no remedy over against some other person, the law will excuse him; but when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or inevitable necessity; because he might have provided against it by his own contract, but did not think proper to do so.² But legislation has, in some jurisdictions, modified this rule.³

¹ *Gates v. Green, supra*. By the law of Scotland, upon the hire of property, a loss or injury to such property, not caused by the fault of the hirer, falls on the owner; and the lessee is entitled to a proportional abatement of the rent. The Code Napoleon, Art. 1722, declared that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded; but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the price or the rescinding of the lease itself. The same provision, substantially, is found in the Code of Louisiana, Art. 2667. Puffendorf refers to a law of Sesostris, that, if the violence of the river should wash away a part of the land, the rent should be proportionably abated. By the custom of Newfoundland, the tenant of a building may surrender his lease, and be excused from further rent, in a case of casual destruction of the building by fire. Some of the English Chancellors strove to introduce this principle into the administration of justice. See *Brown v. Quilter*, Amb. 619; *Steel v. Wright*, 1 T. R. 708, but a contrary principle early prevailed in the equity courts of England, as well as in the courts of law; and the rule stated in the text must be considered as established. In Kansas, however, it has been held, where, by a single instrument, real and personal property is leased for a gross rental, and the personalty is a substantial part of the leased property, that, on the total destruction of such property, the lessee is entitled to a proportionate abatement of the rental. *Whitaker v. Hawley, ubi supra*.

² *Beale v. Thompson*, 3 B. & P. 420, § 372, *ante*; *Peck v. Ledwidge*, 25 Ill. 112.

³ Laws of New York, 1860, c. 345; where it is provided that the tenant may surrender his tenement if rendered untenable by the elements or other casualty without his fault, and thereafter be relieved from rent. A defective flue, which the landlord is bound to keep in order, is sufficient ground for abandoning apartments in a tenement house under this act; *Thomas v. Nelson*, 69 N. Y. 118; *Fash v. Kavanagh*, 24 How.

§ 376. **Stipulations in the Lease for Benefit of the Tenant.** — Commonly, therefore, leases provide for a suspension of rent during such time as the premises may remain uninhabitable, by reason of accidental fire, or other casualty.¹ But a provision in a lease, that the rent shall cease if the premises be-

Pr. R. 347. So defective plumbing, by which malodorous or poisonous gas escapes into the tenement. *Bradley v. Goicouria*, 67 How. Pr. 76; s. c. 14 Abb. N. C. 53. This statute applies only where the injury or destruction occurs after the lessee's entry. *Bloomer v. Merrill*, 1 Daly, 485; *Murray v. Waller*, 42 How. Pr. R. 64. It applies only to the sudden and unexpected action of the elements, not to a gradual deterioration; and tenant must make all ordinary repairs. *Suydam v. Jackson*, 54 N. Y. 250; *Johnson v. Oppenheimer*, 55 *id.* 280; *Sheary v. Adams*, 18 Hun, 181. And see *Wall v. Hinds*, 4 Gray, 256. An intention to waive the benefit of the statute may be gathered from the terms of the lease without an express covenant of waiver. *Butler v. Kidder*, 87 N. Y. 98; and see *Varen v. Rouse*, 94 *id.* 401. If through the tenant's neglect to make repairs the premises become untenable, he cannot abandon them under the act. *Sheary v. Adams*, *supra*. Upon abandonment, the tenant is entitled to reasonable time within which to remove his property. *Bassett v. Dean*, 34 Hun, 250. Now by § 197 of the Real Property Law of New York (L. 1896, ch. 547), a tenant is authorized to surrender, without liability for rent for the unexpired term, where, without his fault, they have been so injured by the elements as to be untenable and unfit for occupancy. See *May v. Gillis*, 169 N. Y. 330. Under a similar statute in Ohio, Rev. Sts. § 4113, a surrender of the premises is held to be a condition annexed to the release of the obligation to pay rent. *Jay v. Davey*, 47 Ohio St. 396. In Virginia, the Code, § 2455, allows a reduction of the rent when buildings are partially destroyed without the tenant's fault. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239. In Louisiana, where a lessor is bound to repair, his omission to do so will not, where the rent is sufficient to enable the tenant to make them, and deduct his expenditure from the rent, authorize a rescission of the lease, or an action for damages. *Scudder v. Paulding*, 4 Rob. (La.) 428.

¹ *Minot v. Joy*, 118 Mass. 308. Such a provision applies to rent in advance. *Rich v. Smith*, 121 Mass. 328. On a covenant to abate rent in case of "inevitable accident" it was held that the words imported something *ejusdem generis* with what had been mentioned previously, and did not apply to that which, though not avoidable as far as the lessee was concerned, was not in its nature inevitable. *Saner v. Bilton*, 7 Ch. D. 815. The rupture of a steam-boiler, while in use under a low pressure of steam with a moderate fire, was held to be an unavoidable casualty, within the provisions of a lease for an abatement of rent until the injury arising from such casualty could be repaired by the lessor. *Phillips v. Sun Dye Co.*, 10 R. I. 458.

come uninhabitable by reason of "fire or other casualty,"¹ does not extend to cases of gradual decay² [unless such decay is a direct result of the fire³], or to the case of a building which becomes untenable in consequence of a portion of it being taken down, to conform to an order of a municipal corporation for the widening of the street on which it is situated.⁴ And the mere fact that a subtenant continues to occupy a portion of it after a fire is not conclusive evidence that the premises are tenantable; for such occupation may be explained.⁵ At common law, however, a lessee under a covenant to pay rent and repair, without an express exception on his part of casualties by fire or tempest, is liable to pay rent upon his covenant, although the premises are burnt down, and not rebuilt by the lessor after he is notified of the accident and required to rebuild; for since the default of the lessor in not rebuilding he is liable in damages to the lessee; and, although it may be a hardship, the lessee must perform his covenant to pay rent during the term.⁶

§ 377. **Implied Covenant of Quiet Enjoyment.—Eviction by Title Paramount.—By Landlord's Act.**—The quiet enjoyment of the premises without any molestation on the part of the landlord is an implied condition on which the tenant is bound to pay rent.⁷ Rent is something given by way of compensa-

¹ If the lease is in writing under seal an exception by parol is inoperative. *Martin v. Behrens*, 67 Pa. St. 459, and see *Phyfe v. Eimer*, 45 N. Y. 102.

² *Hatch v. Stumper*, 42 Conn. 28.

³ *Cary v. Whiting*, 108 Mass. 363.

⁴ *Mills v. Baehr's Executors*, 24 Wend. 254.

⁵ *Kip v. Mervin*, 52 N. Y. 542.

⁶ *Paradine v. Jane*, Aleyn, 26; *Chesterfield v. Bolton*, Com. 627; *Bullock v. Dommitt*, 6 T. R. 650; § 375, *ante*, and cases cited.

⁷ § 305, *ante*; *Budd-Scott v. Daniell*, 1902, 2 K. B. 351. Rent is due when it depends alone on the will of the hirer or lessee to enjoy the thing hired, or when he has not been prevented from enjoying it by the lessor. *Tio v. Vance*, 11 La. 200. It is held, that in the absence of the word "demise" in the lease, the law will not imply a covenant for title as distinguished from a covenant for quiet enjoyment; and that, although the law will imply a covenant for quiet enjoyment, such implied covenant will not enure beyond the termination of the lessor's estate. *Adams v. Gibney*,

tion to the lessor, for the right to make use of the land demised; and, consequently, the landlord's claim for rent depends upon this, that, so far as he is concerned, the land is possessed and enjoyed by the tenant during the term specified in his contract. And, therefore, it would be no defence to an action for rent that the lessee never took possession, unless possession was withheld by the lessor or another, under a title paramount to that of the lessor.¹ But if the tenant be at any time deprived of the premises, in whole or in part, by the landlord's agency, the obligation to pay rent ceases, because his obligation has force only from the consideration, which is the quiet enjoyment of the premises.² It also follows that if the whole land be recovered from the tenant by a third person by a title superior to that of the lessor, the tenant is discharged from the payment of rent after the eviction.³ Thus, the foreclosure and sale of the premises, under a mortgage made prior to the lease, are equivalent to an eviction by title paramount, and will bar the lessor's action for rent; for the lessee's possession after foreclosure is not a matter of right, nor is he bound to attorn to the purchaser.⁴ [Eviction has been defined as "not a mere trespass and nothing more, but something of a grave

6 Bing. 656; *Penfold v. Abbott*, 32 L. J. (Q. B.) 67; *Baynes v. Lloyd*, 1895, 1 Q. B. 820; 2 Q. B. 610.

¹ *McGlynn v. Brock*, 111 Mass. 219; *Mech. & Tr. Ins. Co. v. Scott*, 2 Hilt. 550; *Moffat v. Strong*, 9 Bosw. 57; *Field v. Herrick*, 10 Bradw. (Ill.) 591.

² *Leopold v. Judkins*, 75 Ill. 536; *Poston v. Jones*, 2 Ired. Eq. 350; *Colburn v. Morrill*, 117 Mass. 262. An eviction in fact or in effect, which renders the premises useless, will prevent a recovery of rent. *Halligan v. Wade*, 21 Ill. 470. A leading case on what will constitute an eviction is *Upton v. Townend*, 17 C. B. 30. Here the lessor, under his covenant to restore, rebuilt two houses destroyed by fire, altering both by diminishing one and enlarging the other; and it was held an eviction of both tenants, though both houses were much improved. - There was no subsequent occupation by the tenants; but, as there was a physical ouster, this does not seem material. But see *Campbell v. Shields*, 11 How. Pr. R. 565.

³ *Blair v. Claxton*, 18 N. Y. 509; *Holbrook v. Young*, 108 Mass. 83. See *Williams v. McMichael*, 64 Ga. 445; *Perry v. Wall*, 68 *id.* 70.

⁴ *Simers v. Saltus*, 8 Den. 214. See *Home L. I. Co. v. Sherman*, 46 N. Y. 370; § 121, *ante*; *Peck v. Knickerbocker Ice Co.*, 18 Hun, 183.

and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises as they were demised ;” and accordingly the use by the landlord of the tenant’s rooms, temporarily, on one or more occasions, in the tenant’s absence, was held not to be an ouster.¹ It is said to be an act of permanent character, done by the landlord in order to deprive, and which had the effect of depriving, the tenant of “the use” of the thing demised or a part of it,² but this definition would seem to want qualification.³] But an eviction from either the whole or part of the demised premises will have no effect as to rent due at the time of the eviction ; for the landlord is entitled to collect whatever rent has accrued before the tenant actually quits the possession.⁴ So, if rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for rent ; the most an evicted tenant can equitably claim under these circumstances is a deduction for so much of the quarter as elapses after his eviction.⁵

§ 378. **Eviction from Part of Land by Paramount Title and by Landlord’s Act ; Effect of Each.**—If part only of the land is recovered by the paramount title, such an eviction is a discharge of so much only of the rent as is in proportion to the value of

¹ *Way v. Myers*, 64 Ga. 760.

² *Royce v. Guggenheim*, 106 Mass. 201 ; *Brown v. Holyoke Water Power Co.*, 152 Mass. 463 ; *Hayner v. Smith*, 63 Ill. 480 ; *Lynch v. Baldwin*, 69 *id.* 210. Accordingly, where premises were burned, and before the expiration of the term the landlord executed a new lease to another, it was held an eviction. *Dobbins v. Duguid*, 65 Ill. 464. See §§ 305–315, 329, *ante*, and §§ 378 *et seq.*, *post*, for other instances.

³ §§ 308–309 *a, ante*.

⁴ *Kessler v. McConachy*, 1 Rawle, 435 ; *Baynton v. Bobbet*, 2 Vent. 68 ; *Stokes v. Cooper*, 3 Camp. 814, n. ; *Neale v. Mackenzie*, 1 M. & W. 747 ; *Selby v. Browne*, 7 Q. B. 620 ; *Pepper v. Rowley*, 73 Ill. 262 ; *Fitchb. Man. Co. v. Melven*, 15 Mass. 268 ; *Edgerton v. Page*, 20 N. Y. 281 ; *Leary v. Meier*, 78 Ind. 393 ; *Hunter v. Reiley*, 14 Vroom, 480 ; and see *Salmon v. Smith*, 1 Saund. 204, n. ; *McKeon v. Whitney*, 3 Den. 452.

⁵ *Giles v. Comstock*, 4 N. Y. 270 ; *Whitney v. Myers*, 1 Duer, 266 ; and see *Cram v. Dresser*, 2 Sandf. 120 ; *Carter v. Burr*, 39 Barb. 59. A tortious entry of the landlord suspends the rent during the time the tenant is kept out of possession, but if he regains possession the rent revives. *Mackerbin v. Whitcroft*, 4 H. & McH. 185.

the land from which the tenant has been evicted.¹ But if the lessor himself wrongfully deprives the tenant of any part of the demised premises, the tenant is discharged from the payment of the whole rent, until the possession of the part taken is restored.² And the reason why there will be no apportionment of rent in the latter case is said to be that no man should be encouraged to disturb a tenant in the possession of that which, by the policy of the law, he ought to protect and defend; and the tenant is not liable, even in use and occupation, if he remains in possession of part.³ On the other hand, the reason for the rule, where part is recovered by a paramount title, is that in this case the landlord is not so far in fault as that he should be deprived of a return for that part of the premises which remains in the tenant's possession.⁴ It is an eviction from part, if, at the time of entry by the lessee, the lessor can deliver only such part; or if part of the land is in the possession of a third party, under a prior demise from the

¹ *Lansing v. Van Alstyne*, 2 Wend. 561; *Stevenson v. Lambard*, 2 East, 575; *Carter v. Burr*, 39 Barb. 59; *Fillebrown v. Hoar*, 124 Mass. 580.

² *Graham v. Anderson*, 3 Harringt. 364; *Bennet v. Bittle*, 4 Rawle, 339; *Seabrook v. Moyer*, 88 Pa. St. 417; *Walker's Case*, 3 Co. 22; *Lloyd v. Tomkins*, 1 T. R. 671; *Salmon v. Smith*, 1 Saund. 202-204, n. 2; *Lewis v. Payn*, 4 Wend. 423; *Chatterton v. Fox*, 5 Duer, 64; *Fitchb. Man. Co. v. Melven*, 15 Mass. 268; *Colburn v. Merrill*, 117 *id.* 262; *Day v. Watson*, 8 Mich. 535; *Halligan v. Wade*, *supra*; *Tunis v. Grandy*, 22 Gratt. 109; *People v. Gedney*, 10 Hun, 151; *Smith v. Stigleman*, 58 Ill. 141; *Hayner v. Smith*, 63 *id.* 430; *Skaggs v. Emerson*, 50 Cal. 3; *Royce v. Guggenheim*, 106 Mass. 201; *Fillebrown v. Hoar*, 124 *id.* 580; *Smith v. McEnany*, 170 Mass. 26; *Collins v. Karatopsky*, 36 Ark. 316. (But see *Crossthwaite v. Caldwell*, 106 Ala. 295.) Thus in *Sherman v. Wilkins*, 113 Mass. 481, the erection of a wall under the eaves of the premises demised was an eviction. But such partial eviction does not terminate the lease, and the tenant, if he continues to occupy, is still liable on the other covenants than that for rent. *Morrison v. Chadwick*, 7 C. B. 266.

³ *Lewis v. Payn*, *supra*; *Etheridge v. Osborn*, 12 Wend. 529; Co. Lit. 148, b. In *Leishman v. White*, 1 Allen, 489, it was said that no recovery could be had on the lease because of the eviction, nor in use and occupation for the part retained, as the contract was still in force. So *Grundin v. Carter*, 99 Mass. 15.

⁴ *Lawrence v. French*, 25 Wend. 443; *Ludwell v. Newman*, 6 T. R. 458; *Tomlinson v. Day*, 2 Br. & B. 680.

same landlord, extending beyond the period of the second demise; in which case the demise of the part leased to another will be void.¹ Upon the principle that a tenant shall not be required to pay rent even for the part of the premises which he retains, if he has been evicted from the other part by the landlord's act, it has been held that if a landlord without the consent of the tenant, uses privileges appurtenant to the premises, and which are expressly reserved in the lease, he is not entitled to collect rent. And where the tenant is excluded from a portion of the premises, but remains in possession of the residue thereof, not only is rent suspended until possession is restored but the tenant may claim damages for the diminished value of his lease.²

§ 379. **Eviction, in what it consists.** — An eviction³ consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of some privilege which, by the agreement, he ought to have enjoyed, but has not been permitted to enjoy; thus the mere omission of a landlord to perform his covenants does not amount to an eviction, and is not a bar to his claim for rent; the lessee's remedy being by an action to recover damages for a breach of the covenant.⁴ But where the landlord

¹ *Briggs v. Hale*, 4 Leigh, 484; *Christopher v. Austin*, 11 N. Y. 216; *Shumway v. Collins*, 6 Gray, 227; *Neal v. Mackenzie*, 1 M. & W. 747; *Blair v. Claxton*, 18 N. Y. 529; *Vaughan v. Blanchard*, 1 Yeates, 175; *Griffith v. Hodges*, 1 C. & P. 419; *Walker v. Tucker*, 70 Ill. 527. Here the lessee had been in possession of the residue for six years. In *Tunis v. Grandy*, 22 Gratt. 109, it is intimated that he would be liable for the part retained.

² *Townsend v. Nickerson Wh. Co.*, 117 Mass. 501; *Sherman v. Wilkins*, 113 *id.* 481; *Hegeman v. McArthur*, 1 E. D. Smith, 147. But not to the extent of the injury he may sustain in his business; for the damages in such case will be proportioned to the measure of value between the property lost and the property retained. *Ibid.* But see *Dobbins v. Duguid*, 65 Ill. 464; *Dalton v. Boker*, 6 Nev. 190, which was the case of a diminution of the waters of an irrigating creek.

³ See §§ 308–309 *a*, *ante*.

⁴ *Etheridge v. Osborn*, 12 Wend. 529; *Warren v. Wagner*, 75 Ala. 188; *Chicago Legal News Co. v. Browne*, 108 Ill. 317. The rent of four houses, demised for a term of years, being in arrears, and the lessee having assigned his lease, and two of the houses being unoccupied, the lessor took

let an unfinished house, and agreed to finish it by a certain day, but did not, it was held that the tenant was not bound to occupy the house; although, if he had occupied it, he would have been bound to pay the stipulated rent, since possession subjects a tenant to the payment of rent, unless there has been an eviction.¹ Neither can a lessee claim a deduction from the stipulated rent by reason of a contemporaneous parol agreement to make improvements during the term, which would render the use of the demised premises more valuable; such an agreement can only be shown in case there was fraud in making the lease, or in obtaining its execution.² So where a lessor commanded the breaking down of a partition wall in the house demised, it was held not to amount to a re-entry.³ And where there was a lease of three rooms in a building, together with a landing on a navigable canal, embracing a front of two hundred feet, and the lessee covenanted to pay a certain annual rent, so long as he should be permitted to occupy the premises; it was held that the destruction of the rooms by fire was not embraced in the qualification in the covenant; and that to entitle the defendant to a discharge from the rent, he should have shown a surrender of the whole of the premises; for that, while he remained in possession of a part thereof he could only claim a *pro ratâ* reduction of rent for the part which had been destroyed.⁴ [So where, before the first of May, a person leased a store and dwelling for one year from that day, rent payable quarterly in advance, the store possession of these two, by putting a person in possession, under a parol agreement to grant a lease of the four houses as soon as possession of the other two could be obtained. It was held, that this was not an eviction. *Wheeler v. Stevenson*, 6 H. & N. 155. Where the landlord sued for rent and attached the tenant's personal property on the leased premises, which property the tenant permitted to remain without demanding its surrender, it was held the levy of the attachment and possession of the premises thereunder did not amount to an eviction. *Daniels v. Lyon*, 47 Iowa, 395.]

¹ *Allen v. Pell*, 4 Wend. 505. So *Wright v. Lattin*, 38 Ill. 292; where the condition precedent of repair by the lessor was waived by lessee's entry.

² *Mayor v. Price*, 5 Sandf. 542; *Tibbits v. Percy*, 24 Barb. 39.

³ *Harrison's Case*, Clayt. 34; *Smith v. Raleigh*, 3 Camp. 513.

⁴ *Willard v. Silliman*, 19 Wend. 358.

and dwelling to be erected and completed by that day and the upper story to be finished into a dwelling; and the tenant entered into possession and remained until the second quarter's rent fell due and then abandoned the premises; it was held to be no objection to the collection of rent, that the premises were untenable by reason of the building not being completed by the landlord according to the agreement.^{1]}

§ 380. **Mere Entry without Eviction does not relieve from Covenant.** — Any other mere entry upon the premises by the landlord, without an eviction, does not discharge the rent; for the landlord, in such a case, is at most only a trespasser² [and a mere trespass by the landlord, as where he piled firewood on part of the leased land, which does not interfere with the substantial enjoyment of the premises, does not amount to an eviction nor release the tenant from the payment of rent, the tenant's remedy being by an action against the lessor for the injury, if any, which he has sustained.^{3]} Thus where a landlord, owning a lot adjoining the demised premises, built a house on the lot so as to cut off the tenant's light and air; or inadvertently put up a division fence on the tenant's land; or where he continued the possession of a small portion of the demised premises, for a brief period after the expiration of the time fixed by the lease for his giving possession, without intent to keep the tenant out of it; in these cases his act was held not to amount to an eviction nor to exonerate the tenant from payment of rent.⁴ [And so where, the tenant having abandoned, the landlord entered and put up notices "To let."^{5]} But where a party, after executing leases of portions

¹ *Nichols v. Dusenbury*, 2 N. Y. 283.

² *Wilson v. Smith*, 5 Yerg. 379; *Bartlett v. Farrington*, 120 Mass. 204; *Fuller v. Ruby*, 10 Gray, 385; *Cushing v. Adams*, 18 Pick. 110; *Walker v. Shoemaker*, 4 Hun, 579.

³ *Lounsbery v. Snyder*, 31 N. Y. 514.

⁴ *Palmer v. Wetmore*, 2 Sandf. 316; *Myers v. Gemmel*, 10 Barb. 537; *Hazlett v. Powell*, 30 Pa. St. 293; *Vanderpool v. Smith*, 1 Daly, 311; *Mirick v. Hoppin*, 118 Mass. 582.

⁵ *Pier v. Carr*, 69 Pa. St. 326; *Oastler v. Henderson*, 2 L. R. Q. B. Div. 575. That an adjoining owner undermines the tenant's wall is no excuse for the non-payment of rent. *Kramer v. Cook*, 7 Gray, 550.

of his farm to several tenants, granted the whole farm, with the reversion of the demised premises, to a tenant in fee, reserving an annual rent, and after such grant entered upon the premises, and distrained the goods of the original tenants, for rent accrued subsequent to the grant of the whole estate, — the entry and distress were held to be equivalent to an eviction of the principal tenant, and to work a suspension of the rent.¹ And if a landlord takes possession of the ruins of his premises damaged by fire, for the purpose of rebuilding, without the consent of his tenant, it is an eviction, if with such consent, it is a rescission of the lease, and in either case the rent is suspended.² [So repairs that are not ordinary, but of a kind to deprive the tenant of all beneficial use, or at least seriously to interrupt it for a considerable time; amount to an eviction.³ But if repairs are made by agreement, and a specified reduction of rent is provided for to compensate the tenant for the inconvenience, the tenant cannot set up the fact that the repairs have occupied a longer time than was anticipated, in defence to an action for the rent.⁴] Generally, where a landlord does acts merely tending to diminish the beneficial enjoyment of the premises, and the tenant continues to occupy them,⁵ or where the landlord deprives the tenant of something out of which no rent issues, the obligation to pay rent continues.⁶

§ 381. **Acts to produce Eviction. — Intent essential. —** In order to work an eviction, it is not necessary that there

¹ *Lewis v. Payn*, 4 Wend. 423.

² *Magaw v. Lambert*, 3 Pa. St. 444. See *Heller v. Royal Ins. Co.*, 133 Pa. 152, 151 *id.* 101.

³ *Hoeveler v. Fleming*, 91 Pa. St. 322.

⁴ *Reineman v. Blair*, 96 *id.* 155. See *Maberry v. Dudley*, 2 Penny. (Pa.) 367; *McMann v. Autenreith*, 17 Hun, 163.

⁵ *Edgerton v. Page*, 20 N. Y. 281; *Boreal v. Lawton*, 90 N. Y. 293; *Acad. of Mus. v. Hackett*, 2 Hilt. 217; *Mortimer v. Brunner*, 6 Bosw. 658.

⁶ *Sanderson v. Harrison*, Cro. Jac. 679; *Watts v. Coffin*, 11 Johns. 495; *Williams v. Hayward*, 1 Ellis & E. 1040; *Lynch v. Baldwin*, 69 Ill. 210. So where the lessor failed to repair water-pipes, or lowered the grade of the street outside the demised premises. *Coddington v. Dunham*, 35 N. Y. 412; *Gallup v. Alb. R. R.*, 7 Lans. 471.

should be an actual physical expulsion, for the landlord may do many acts tending to diminish the enjoyment of the premises, without effecting an actual expulsion, which will amount to an eviction in law, and exonerate the tenant, if he quits possession, from the payment of rent.¹ [Where the lease was of a room and machinery therein with power to run the machinery, supplied from outside and the landlord cut off the power, thus stopping the tenant's business; this was held to be a breach of the covenant for quiet enjoyment, and an eviction, entitling the tenant to substantial damages.²] As a tenant is entitled to the beneficial enjoyment of the premises, unmolested by the landlord; if the landlord should erect a nuisance or a permanent structure so near the demised premises as to deprive the tenant of the use of them, or of any considerable portion thereof, it would in either case be equivalent to an eviction, and justify the tenant in quitting possession.³ And where the lessor habitually brought lewd women under the same roof with the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance arose, and in consequence the lessee quitted the premises with his family, it was held to amount to an eviction, and no rent was recoverable.⁴ But no wrongful act of the landlord will suspend or extinguish the rent, if the tenant continues to occupy the premises during the

¹ § 309 *a*, *ante*. Thus, evidence that the tenant was enjoined from using the demised premises by an *ex parte* injunction issued at the landlord's instance is admissible under a plea of eviction in an action for the rent. *Pfund v. Herlinger*, 10 Phila. 13.

² *Brown v. Holyoke Water Power Co.*, 152 Mass. 463.

³ *Royce v. Guggenheim*, 106 Mass. 201; *Skally v. Shute*, 132 Mass. 367; § 309 *a*, *ante*. But a breach of the lessor's covenant not to rent other property in the same neighborhood for the same business as that of the lessee is not an eviction. *Allegaert v. Smart*, 2 Penny. (Pa.) 320.

⁴ *Pendleton v. Dyett*, 4 Cow. 581; 8 *id.* 727. In *Cohen v. Dupont*, 1 Sand. 260, this case was followed, and any intentional disturbance to tenant's beneficial occupancy authorized the latter to quit. So where the lease reserved rooms which the lessor occupied, and the lessee was compelled to remove by reason of gaming, unseemly sports, uncouth noises, profane and obscene expressions, proceeding therefrom, this was held a constructive eviction. *Rowbotham v. Pearce*, 5 Houst. 135.

time such rent accrued.¹ / The intent of the landlord to evict must always appear in the case of eviction without physical ouster, and this is a question of fact.² / The act complained of must proceed from the landlord, for where a tenant abandons the premises, and resists the payment of rent subsequently accruing, on the ground that other apartments in the same building, adjoining or below his, are occupied as a place of prostitution, he must show that the landlord created the nuisance, by leasing the apartments for that purpose, or that it existed by his connivance and consent.³ [For if a landlord

¹ *Egerton v. Page*, 20 N. Y. 281 ; *Cram v. Dresser*, 2 Sandf. 120. The distinction is to be observed that if there is a physical ouster of however small a part of the premises, the tenant need pay no rent for the part retained by him, and need not abandon it in order to complete the eviction. See cases cited *ante*, § 378, 380, and notes. But if there are only acts of trespass on the part of the landlord, or which merely diminish the beneficial occupation of the lessee, he must abandon the premises or be still bound for the rent. See *Elliott v. Aiken*, 45 N. H. 35 ; *Gilhooley v. Washington*, 4 N. Y. 217 ; *Wilson v. Smith*, 5 Yerg. 379 ; *Rogers v. Ostrom*, 35 Barb. 523 ; *De Witt v. Pierson*, 112 Mass. 8 ; *Barrett v. Boddie*, 158 Ill. 479 ; *Lieferman v. Osteen*, 167 *id.* 93 ; *Newby v. Sharpe*, 8 Ch. D. 39. Thus on a refusal by lessor to permit sublessee to occupy : *Randall v. Alburtis*, 1 Hill, 28 ; or his notice to under-tenant to quit, on which the latter acts : *Burns v. Phelps*, 1 Stark. 94 ; *Levitsky v. Canning*, 33 Cal. 299 ; or refusal to give lessee a lease : *Greton v. Smith*, 33 N. Y. 245 ; or, where the lease was of a distillery, his refusal to give lessee the certificate required by law, in order to enable him to commence business : *Grabenhorst v. Nicodemus*, 42 Md. 236 ; or where an adjoining cellar owned by landlord was so offensive as to be a nuisance : *Alger v. Kennedy*, 49 Vt. 109 ; and see *Scott v. Simons*, 54 N. H. 426 ; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662. So *Boston & W. R. R. v. Ripley*, 13 Allen, 421 ; *Jackson v. Eddy*, 12 Mo. 209 ; *Peck v. Hiler*, 24 Barb. 178 ; *Lawrence v. French*, 25 Wend. 443 ; § 309 *a, ante*. In *Halligan v. Wade*, 21 Ill. 470, injuries to tenant's beneficial occupation were held a defence to rent, though the lessee remained in occupation. But in *Leadbeater v. Roth*, 25 *id.* 587, this case is stated in conformity with the text.

² *Upton v. Townend*, 17 C. B. 30 ; *Henderson v. Mears*, 1 Fost. & F. 636.

³ *DeWitt v. Pierson*, 112 Mass. 8 ; *Pelton v. Place*, 71 Vt. 431. See *Mortimer v. Brunner*, 6 Bosw. 653 ; *Ogilvie v. Hull*, 5 Hill, 52. And in *Townsend v. Gilsey*, 1 Sweeny, 155, a landlord was held not responsible, unless he knew at the time of demise that the place was to be used for prostitution. Annoyance to the tenant of a house which had been used as a brothel before he lived in it, by lewd persons constantly calling for

lets part of a house to one tenant, and another part to another, and one of them makes his part a nuisance so as to render the other part no longer habitable, it is held that the lease to the other is not thereby determined, nor the lessee excused from the payment of rent; for that the doctrine of eviction by nuisance is not applicable when the landlord is not instrumental in producing the nuisance; nor is the landlord under obligation to institute proceedings against the disorderly tenant for a misdemeanor.¹]

§ 382. **No Implied Warranty as to Condition of Leased Property.** — Generally there is no implied warranty on the letting of a house, that it is safe, well-built, or reasonably fit for habitation; or of land that it is suitable for cultivation, or for any other purpose for which it was let.² And where one hired a

admittance, so that he was obliged to remove therefrom, is not an eviction. Nor was the landlord bound to disclose to a lessee the purposes to which the demised premises had been previously put, nor can he be held liable for the conduct of strangers. *Meeks v. Bowerman*, 1 Daly, 99.

¹ *Gilhooley v. Washington*, 4 N. Y. 217. See §§ 309 *a*, 316, *ante*.

² *Westlake v. Degraw*, 25 Wend. 669; *O'Brien v. Capwell*, 59 Barb. 477; *Graves v. Cameron*, 58 How. Pr. 75; *Welles v. Castles*, 3 Gray, 323; *Libbey v. Tolford*, 48 Me. 316; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, *id.* 242; *Stevens v. Pierce*, 151 Mass. 207; *Rutland Foundry & Machine Shop Co. v. King*, 51 Vt. 462; *Coe v. Vogdes*, 71 Pa. St. 383; *Smith v. Kinkaid*, 1 Bradw. (Ill.) 620; *Gaither v. Generator Co.*, 121 N. C. 38; *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, *id.* 52; overruling *Edwards v. Etherington*, 2 Ry. & M. 268; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; *Collins v. Barrow*, 1 Mo. & R. 112; *Salisbury v. Marshall*, 4 C. & P. 65. There is no such implication, on a letting of land for agricultural purposes, as that no noxious plants, or the like, are growing on the demised premises: *Erskine v. Adeane*, L. R. 8 Ch. 756; or as to a building that it shall continue fit for the purposes for which it was let: *Robins v. Mount*, 4 Rob. (N. Y.) 553; *Acad. of Music v. Hackett*, 2 Hilt. 4. In the absence of any stipulation on the subject, a person who agrees to take a house, must take it as it stands, *Chappell v. Gregory*, 34 Beav. 250, and a warranty that a house is habitable is not a warranty that it will continue so. *Fowler v. Stevens*, 49 N. Y. S. C. 479. Where a landlord covenanted to make certain repairs, and at time of making these orally agreed to make certain other repairs, which oral agreement he did not fulfil, it was held that the tenant could not maintain an action for injuries received by reason of such failure. *Kabus v. Frost*, 50 N. Y. S. C. 72. The general rule was ap-

house and garden for a term of years, to be used for a dwelling-house, but subsequently abandoned it as unfit for habitation, in consequence of its being infested with vermin and other nuisances, which he was not aware of when he took the lease, it was held, after an elaborate review of the cases, that there is no implied contract on a demise of real estate that it shall be fit for the purposes for which it was let, [for the doctrine of implied warranties relates to the title and not to the condition of the premises¹]. And, in all cases where a tenant has been allowed upon suggestions of this kind to withdraw from the tenancy, and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment, as to the state of the premises which were the subject of the letting; or else the premises were rendered uninhabitable by some wrongful act or default of the landlord. The lessor is not, however, always bound to disclose the state of the premises to the intended lessee, unless he knows that the house is really unfit for habitation and that the lessee does not [and cannot upon a reasonable examination] know it, and is influenced by his belief of the soundness of the house in agreeing to take it. But if these facts appear, the conduct of the lessor may amount to a deceit practised upon the lessee [so as to justify a rescission of the contract on his part.² Thus while there is no warranty that the premises are fit for habitation, yet if they are subject to a nuisance prejudicial to life or health, which is not apparent on inspection of the premises, it is the landlord's duty to inform the tenant of it, because it is assumed that the tenant takes the premises as healthy.³ Thus the letting premises known to be infected with small-pox was held actionable.⁴ And so when the lessor fraudulently concealed the dangerous condition of the

plied in favor of the landlord where the tenant's property was injured by the leaking of the water-pipes on the premises. *McKeon v. Cutter*, 156 Mass. 296.

¹ *Cleves v. Willoughby*, 7 Hill, 83. The rule is otherwise in Louisiana, *Perrett v. Dupré*, 3 Rob. (La.) 52; *King v. Grant*, 43 L. Ann. 817.

² *Izard v. Gorton*, 5 Bing. N. C. 501.

³ *Wallace v. Lent*, 1 Daly, 481.

⁴ *Minor v. Sharon*, 112 Mass. 477; *Cesar v. Kountz*, 60 N. Y. 229.

drains on the premises.¹ But it is always to be observed, there being in these cases no physical ouster, that in order to set up the landlord's fault, the tenant must quit the premises. Thus where a tenant was induced to accept a lease by false representations, continued to occupy the premises, and paid rent for nine months, it was held that he, and his surety, were thereby precluded from raising the objection of fraud,² and so where the landlord fraudulently concealed the bad reputation of the premises as a house of prostitution, and the tenant remained in possession without repudiating the contract³].

¹ *Crump v. Morell*, 12 Phila. 249. See *Hazlett v. Powell*, 30 Pa. St. 293.

² *Rosenbaum v. Gunter*, 3 E. D. Smith, 203.

³ *Carhart v. Ryder*, 11 Daly, 101. In *McGlashan v. Talmage*, 37 Barb. 313, the rule was carried so far as to include a stench injurious to health. The difficulty is to determine when the failure by the landlord to disclose a defect is concealment or active deceit. Where he directly leads by words or conduct to a false impression as to the existence of a nuisance, he is liable. *Staples v. Anderson*, 3 Rob. (N. Y.) 327. In *Keates v. Cadogan*, 10 C. B. 591, following *Cornfoot v. Fowke*, 6 M. & W. 308, the mere failure to disclose that the premises were ruinous was held no defence to an action for the rent. The rule of *caveat emptor* stated in *Hart v. Windsor*, 12 M. & W. 68 (see § 175 *b*, *ante*), was here applied; and the same rule was laid down in *Westlake v. Degraw*, *supra*; *Christopher v. Austin*, 11 N. Y. 216; and in *Sutphen v. Sebass*, 14 Abb. N. C. 67, n.; *Coulson v. Whiting*, *id.* 60, it was held that, in general, a landlord is not bound to disclose defects in the structure or condition of the premises, as a defect in the plumbing, that make them unfit for habitation. There is no presumption of law that a landlord knows the defective condition of his houses, *Jackson v. Odell*, 9 Daly, 371; and in *Coulson v. Whiting*, *supra*, it was held that unless circumstances show a different understanding, a statement by the landlord that the house is in good order is to be taken merely as an expression of opinion, and not as the assertion of a fact. In Michigan, it is held, when premises are rented with the distinctly implied understanding that they are in good condition, as where the lessee covenants that he so receives them, that such understanding becomes part of the consideration, and that if the consideration fails the lessee is justified in abandoning and refusing to pay rent. *Tyler v. Disbrow*, 40 Mich. 415. Where the lessor of a coal-mine that could not be examined, by wilfully false representations induced the lessee to accept a lease which was of less value than if the representations had been true, it was held that the lessor was answerable in damages to the lessee. *Arbuckle v. Biederman*, 94 Ind. 168.

§ 383. **Exception in Contracts of a Mixed Nature.** — When the contract is of a mixed nature, as for lodging, or of a house with furniture, it is held that the landlord does impliedly contract that it is reasonably fit for habitation, and that the tenant may quit without notice, if it be not so. Thus, where a man took a ready-furnished house, but upon entering found it so infested with vermin as to be unfit for occupation, it was held that the house being let with the furniture, for occupation, for a limited period, there was an implied condition that it should be habitable when the defendant entered upon the possession; and it therefore was left to the jury to say whether, under the circumstances of the case, the alleged grievance amounted to a nuisance, or was merely made a pretext by the tenant for leaving the house.¹ [A more modern statement of the principle is that “one who lets for a short time a house provided with all furnishings and appointments for immediate habitation, may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation.”²] When, from the terms of the lease, it appears that the property rented is to be fitted up as a store, it will be understood that the store shall be fit for such use at the time of the commencement of the term.³ And where a furnished house was let at a

¹ *Smith v. Marrable*, 11 M. & W. 5. See also *Cowie v. Goodwin*, 9 C. & P. 378; *Potter v. Truitt*, 3 Harringt. 331. The case of *Smith v. Marrable* has been repeatedly questioned, *Howard v. Doolittle*, 3 Duer, 464; *Franklin v. Brown*, 118 N. Y. 110; *Edwards v. McLean*, 122 N. Y. 303; *Murray v. Albertson*, 50 N. J. L. 167, and was only sustained on the ground that the demise was of a furnished house. *Dutton v. Gerrish*, 9 Cush. 89; *Naumberg v. Young*, 15 Vroom, 332, where the contrary rule was applied in the case of a lease of a factory and machinery therein. It was, however, followed in *Wilson v. Finch*, Hatton, 2 L. R. Exch. Div. 336, but in that case not only were the premises a furnished house, but there was an apparent affirmative answer to the tenant's inquiry if the drains upon the premises were in good order. The case is explained in *Sarson v. Roberts*, 1895, 2 Q. B. 395, where it is held that, on the letting of furnished lodgings, there is no implied warranty that the lodgings shall remain fit for habitation during the term.

² *Ingalls v. Hobbs*, 156 Mass. 348.

³ *La Farge v. Mansfield*, 31 Barb. 345. A lease of a coal mine does not warrant that the land contains coal. *Harlan v. Lehigh Co.*, 35 Pa. St. 287. So where the lease was of surplus water-power, the lessor was not

certain rent payable in advance from a certain future day, with an agreement that it should be furnished suitably for a school, it was held that the suitable furnishing of the house was a condition precedent to the right to demand rent.¹

§ 384. **Rent not recoverable when Consideration fails.** — Rent being an equivalent for an interest enjoyed, a covenant for its payment cannot be enforced if no estate passed under the lease and the tenant has not occupied the premises ; since there is no legal consideration for the engagement ; as, if an attorney grants a lease for another in his own name, instead of the name of his principal ;² or if the committee of a lunatic, having no legal authority for that purpose, makes leases in his own name ;³ or if the lessor (supposing him competent to demise) has no interest in the premises,⁴ or if the contract of demise is avoided for the lessor's fraud.⁵ [So where the lease is rescinded by the lessor, and the rent has been paid in advance, the lessee may recover any excess over the value for the time he occupied.⁶] The same result follows, whether the lease is void at common law or has been annulled by statute.⁷ And where a license was granted for a term of years to continue a channel opened through the bank of a navigable canal, in order that the waste water might pass through the channel to the mills of the grantee, on his covenanting to pay

bound to keep the canal in order : *Trustees v. Brett*, 25 Ind. 409 ; *Morse v. Maddox*, 17 Mo. 569 ; *Ballard v. Butler*, 30 Me. 94 ; but where the lessor was to furnish steam-power, here, as an overt act was contemplated on the part of the lessor, on his default his lessee may abandon or recoup ; *Crane v. Hardman*, 4 E. D. Smith, 339 ; *Fisher v. Barrett*, 4 Cush. 381.

¹ *Mechelen v. Wallace*, 7 Ad. & E. 54, n.

² *Frontin v. Small*, 2 Ld. Ray. 1418 ; *May v. Trye*, Freem. 447 ; § 139, *ante*.

³ *Knipe v. Palmer*, 2 Wils. 130.

⁴ *Aylet v. Williams*, 3 Lev. 193 ; *Field v. Herrick*, 14 Bradw. (Ill.) 181, where the lessee at the beginning of the term found another in possession, rightful as between him and the lessor.

⁵ *Milliken v. Thorndike*, 103 Mass. 382.

⁶ *Smith v. Newcastle*, 48 N. H. 70. Although a rescission is claimed, rent already accrued is not affected. *Learned v. Ryder*, 61 Barb. 552.

⁷ *Cleves v. Willoughby*, 7 Hill, 83 ; *Jevens v. Harridge*, 1 Saund. 6 ; s. c. 2 Keb. 102, 116.

a certain annual sum, but it appeared that the grantors had no legal or equitable estate in the premises professed to be granted; it was held that the grantee or his assignee was not bound by the covenant.¹ But although a man cannot execute a valid lease of land which he does not own, or of buildings not yet erected, if he agrees with another to purchase land and erect a building and give him a lease thereof, and the other treats the building as completed and enters into possession under a contract, he becomes bound to pay rent according to the agreement, although the building may not be finished.²

§ 385. **Apportionment of Rent.—When by Act of Parties Lessee's Consent essential.**—The tenant's obligation to pay rent may be apportioned; for, as rent is incident to the reversion, whenever that is severed, either by the act of the parties, as where the lessor grants part of it to a stranger, or by act of law, when it descends to his heirs; the rent following the reversion will be apportioned, and become payable to the assignees of the respective portions thereof.³ But the lessee's consent to the apportionment, when made by the lessor alone, is necessary to give it validity; unless the proportion of rent chargeable upon each part of the land has been agreed upon between the lessor and his assignee, or otherwise determined.⁴ Such an apportionment is to be made among the several owners of the reversion, or of the rent, according to the value of the several parts held by each, and not according to the quantity, or number of acres;⁵ and it is for a jury to apportion the rent to the value, unless the parties themselves settle the proportions which are to be collected from each tenant.⁶ Where

¹ *Portmore v. Bun*, 1 B. & C. 694.

² *Haven v. Wakefield*, 39 Ill. 509.

³ *Daniels v. Richardson*, 22 Pick. 569; *Crosby v. Loop*, 13 Ill. 625, 627; *Green v. Massie*, *id.* 625; *Worthington v. Cooke*, 56 Md. 51; *Ehrman v. Mayer*, 57 *id.* 612; Co. Lit. 148, a.

⁴ *Bliss v. Collins*, 5 B. & A. 876; *Roberts v. Snell*, 1 Mann. & G. 577; *Ryerson v. Quackenbush*, 2 Dutch. 286; *Farley v. Craig*, 6 Halst. 262.

⁵ *Van Rensselaer v. Gallup*, 5 Den. 454; *Same v. Bradley*, 3 *id.* 135; *Reed v. Ward*, 22 Pa. St. 144; *Biddle v. Husman*, 28 Mo. 597.

⁶ 3 Kent, Com. 470; *Cuthbert v. Kuhn*, 3 Whart. 857; *Farley v. Craig*, 6 Halst. 262; *McElderry v. Flannagan*, 1 Har. & G. 308.

there is no evidence as to value, the apportionment will be made according to the quantities.¹ And where the lessor is entitled only to a proportional part of the rent, his action for its recovery need not be confined to that part, but he may sue for the whole amount, and recover so much as he ought to have, and will be barred as to the residue.² An apportionment of rent follows only upon an alienation of the reversion, in parcels, by the lessor; for a tenant cannot, by an assignment of the term, relieve himself of any portion of his liability on his contract.³ He may transfer his privity of estate to the extent of the parcel assigned, but as the assignee succeeds to his liability, the lessor will have a double remedy; against the lessee on his privity of contract, and the assignee on the privity of estate.⁴ Nor can one of two joint tenants under a lease discharge or apportion his liability by assigning over to the other; for the lessees, by their own act, cannot divide the rent so as to put the lessor to several remedies for it.⁵

¹ *Van Rensselaer v. Jones*, 2 Barb. 643; *Linton v. Hart*, 25 Pa. St. 193.

² *Walter v. Maunde*, 1 Jac. & W. 181; *Worthington v. Cooke*, *supra*. Where land in possession of a tenant for years is conveyed by deed, the right of a purchaser of the reversion to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion it. *Flinn v. Calow*, 1 M. & G. 589. If one of two tenants in common, lessors, gives notice to the lessee not to pay his portion of the rent to the other, he may recover his share from the tenant, if the latter pays the whole to the other; *Harrison v. Barnsby*, 5 T. R. 246.

³ *Rushden's Case*, Dyer, 4, b.; *Broom v. Hore*, Cro. El. 633.

⁴ *Stevenson v. Lambard*, 2 East, 575. See *Mayor, &c. v. Thomas*, 10 Q. B. D. 48.

⁵ *Bailiff of Ipswich v. Martin*, 1 Roll. Abr. 235, l. 35. Where several persons being the owners of land chargeable with rent, as tenants in common, make a partition among themselves, each assuming the payment of his equitable share of the rent, a release to one owner will not extinguish the liability of another, and the land of each still remains chargeable with the rent; but, as between themselves, each is liable to the other for any amount he may be compelled to pay beyond his proportionate share. *Van Rensselaer v. Chadwick*, 22 N. Y. 35. And if a part of the land so partitioned comes to the possession of a third person, he is liable as assignee of the lessee. *Van Rensselaer v. Gifford*, 24 Barb. 349. An assignee is liable to pay the whole rent when it becomes due, and cannot collect a portion of it from his assignor, the lessee; for, in the absence of a special agreement, the rent cannot be apportioned between them. *Graves*

§ 386. **Apportionment by Act of Law. — Lessee's Consent not Essential.** — But whenever a reversion is severed by act of law, there will be an apportionment of rent without the consent of tenants. Thus, upon a descent of the reversion among heirs, or on a judicial sale of part of the demised premises, the tenant will have two landlords, and be bound to pay rent to each, for the portion of the premises belonging to them respectively.¹ Or if a landlord dies leaving a widow, she will have a right to receive one third of the rent, while the remaining two thirds will be payable to his heirs.² So the appropriation of a portion of the premises to public uses, as by opening a street, extinguishes a ratable proportion of the rent; and if necessary the amount due for the residue of the estate may be ascertained in equity.³ So if a tenant purchases the reversion of a part of the demised premises at a sale on execution against his landlord, he is entitled to apportionment.⁴ And if he assigns part of his interest to another, the lessor may maintain an action against the assignee for his proportion of the rent.⁵

§ 387. **Examples of Apportionment by Act of Law.** — Other instances of apportionment by act of law, may be mentioned. Thus, if a landlord enters upon part of the land for a forfeiture, he is only entitled to the proportion of rent due for the other part.⁶ Or if the tenant surrenders part of his estate

v. Porter, 11 Barb. 592. A rent charge may be apportioned between landlord and tenant. *Church v. Seeley*, 110 N. Y. 457.

¹ *Cole v. Patterson*, 25 Wend. 456; *Co. Lit.* 148, a; *Wotton v. Shirt*, *Cro. El.* 742; *Crosby v. Loop*, 13 Ill. 625; *Buffum v. Deane*, 4 Gray, 385.

² 1 Roll. Abr. 237, b, 12, Apportionment; *Ewer v. Moyle*, *Cro. El.* 771.

³ *Gillespie v. Thomas*, 15 Wend. 46; *Wiggin v. N. York*, 9 Paige, 16; *David v. Beekman*, 5 La. Ann. 545; *Kingsland v. Clark*, 20 Mo. 24; *Sch. & Del. Co. v. Schmoele*, 57 Pa. St. 271.

⁴ *Nellis v. Lathrop*, 22 Wend. 121.

⁵ *Van Rensselaer v. Bradley*, 3 Den. 135. Rent payable in fowls and service with carriage and horses, is in its nature divisible and apportionable. *Van Rensselaer v. Clifford*, 24 Barb. 349.

⁶ *Walker's Case*, 3 Co. 22. But if he enters wrongfully upon part of the land and evicts the tenant, the rent is suspended for the whole and no apportionment will be made. *Ibid.* See § 381, n., *ante*.

to the lessor, retaining the other part, the rent will be apportioned, and payable only in respect to the residue of the premises.¹ And if he be evicted from part by force of a paramount title, there will be no suspension of the whole rent, but it will be apportioned, and is payable only for the residue.² As between the lessor and an assignee of the lessee, the lessor's right to rent depending solely upon the privity of estate, an eviction out of part will not suspend the rent *in toto*, but the assignee will continue liable for rent payable in respect to the residue of the lands demised.³

§ 388. **Eviction suspends Rent thereafter accruing.** — Where the lessee has been once evicted, the rent will be suspended for the future, although the obstacle to his re-entry may have been removed. Thus where a defendant pleaded that the lessor entered and held him out, it was considered that the entry of the lessor was enough to satisfy the averment of holding out, and that it suspended the rent, although it appeared that the lessor retired from the land immediately after the lessee's eviction.⁴ So where a lessee took possession of a farm, under an agreement which his landlord in a material point failed to fulfil, and occupied the premises for a year; at the expiration of which time the landlord sued him for the full amount of the rent; it was held that the agreement was evidence only of the amount of rent to be paid when the tenant had occupied under the agreement; but that, the landlord

¹ *Smith v. Malines*, Cro. Jac. 160.

² *Ibid.*; Co. Lit. 148; *Walker's Case*, *supra*.

³ *Stevenson v. Lambard*, 2 East, 575. See *Mayor, &c. v. Thomas*, 10 Q. B. D. 48; § 381, *ante*.

⁴ *Cibel v. Hill*, 1 Leon. 110. Under a covenant that if the landlord re-enter for non-payment of rent, he may relet the premises as the tenant's agent, and that the tenant shall be liable for any deficiency; if the landlord re-enters and relets, and brings an action for the deficiency before the rent under the new lease becomes due, he can recover only the difference between the rent reserved by the original lease and the rent agreed to be paid by the tenant. By commencing the action before waiting to see if the new tenant pays the rent, he assumes the hazard of a default. In such an action, the landlord cannot recover for the expenditures made by him upon the premises after the re-entry, although thereby he was able to relet at larger rent. *Hackett v. Richards*, 13 N. Y. 138.

having failed to fulfil the agreement, in the particular which had induced the lessee to propose becoming a party to it, the tenant could not be said to hold the farm under the agreement; and that, therefore, the landlord was entitled to recover only so much rent as the jury should think the tenant ought to pay, under all the circumstances.¹ Where part of the land is lost to a tenant by the act of God, he is not liable for the whole rent; as, if the sea break in and overflow a part of the land, in which case, although the soil remains to the tenant, he cannot appropriate the fishery, which is its only use, to his exclusive enjoyment, the sea being open to every one. But a distinction is made between the sea and fresh water, because though the land be covered with fresh water, the right of taking fish there is exclusively vested in the lessee, and therefore there will be no deduction of rent in this event.²

§ 389. **No Apportionment in Respect of Time.—Statutory Exception.**—It is well settled that in all cases of periodical payments, accruing at intervals, and not *de die in diem*, there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease.³ If, therefore, a tenant is evicted at any time before rent becomes due, it is not payable at all. Thus if there be a lease for a term of years, with rent payable annually, and before the expiration of the year the lessee be evicted, the lessor can have no rent;⁴ or, if the rent is payable quarterly, and the tenant be turned out before the end of a quarter, the landlord loses the rent of the current quarter.⁵ And a similar result follows upon a

¹ Tomlinson v. Day, 2 Br. & B. 681.

² 1 Roll. Abr. 236, l. 46; Richard le Taverner's Case, Dyer, 56, a.

³ Clapp v. Astor, 2 Edw. Ch. 379; Mayor v. Ketchum, 67 How. Pr. 161; Wilson v. Harman, 2 Ves. Sr. 672.

⁴ Bank of Penn. v. Wise, 3 Watts, 394; Plymouth v. Throgmorton, 1 Salk. 65.

⁵ Zule v. Zule, 24 Wend. 76; Clun's Case, 10 Co. 128; Wood v. Partridge, 11 Mass. 488. If rent be payable quarterly, nothing is due until the time stipulated for payment arrives. Fitchb. Man. Co. v. Melven, 15 id. 268. So where the lease was terminated between rent-days in pursu-

voluntary surrender of the term by the lessee or his assignee to the landlord, before the rent of the current quarter becomes payable.¹ For this reason, at common law, if a tenant for life made a lease for years, rendering a yearly rent, and died in the course of the year, the rent was lost to both executor and remainder-man, and was recoverable neither at law nor in equity; it did not accrue in the time of the remainder-man, and the tenant's estate was absolutely determined by the lessor's death, so that there was nothing which could be apportioned.² The Statute of 11 Geo. II. c. 19, supplemented by subsequent enactments, applied a remedy to cases of this kind. [This statute has been re-enacted, substantially in most, if not all of the States, and it is to the effect that when a tenant for life, who shall have demised lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under-tenant the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death.] As here stated, the statute applies only to leases made by the tenant for life, and not to those made by the testator;³ and therefore a devisee for life of the income of real estate leased for a term of years, is entitled only to the rents falling due in his lifetime; and if he dies between two quarter-days, the rent cannot be apportioned, but goes to the remainder-man.⁴

ance of a power reserved in the lease. *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 *id.* 219, n. A tenant at will is not liable for use and occupation from the rent-day preceding the eviction, nor as a tenant at sufferance, because he is a tenant at will. *Emmes v. Feeley*, 132 Mass. 346; *Hammond v. Thompson*, 168 Mass. 531. See *Robinson v. Deering*, 56 Me. 357; *Cameron v. Little*, 62 *id.* 550.

¹ *Young v. Peyser*, 3 Bosw. 308; *Curtis v. Miller*, 17 Barb. 477.

² *Clun's Case*, *supra*; *Jenner v. Morgan*, 1 P. Wms. 392; *Cutter v. Powell*, 6 T. R. 320; *Perry v. Aldrich*, 13 N. H. 343.

³ *Rapalye v. Rapalye*, 27 Barb. 610. In *Borie v. Crissman*, 82 Pa. St. 125, the statute was held to apply to rent in kind.

⁴ *Stillwell v. Doughty*, 3 Bradf. 359; *Marshall v. Moseley*, 21 N. Y. 280; *Sohier v. Eldredge*, 103 Mass. 345. But an heir would take the whole quarter's rent as incident to the reversion. *Fay v. Halloran*, 35 Barb. 295; *Lowe v. Felch*, 3 Bosw. 63.

§ 390. **To whom Rent may be payable.** — With respect to the person to whom rent is payable, every tenant is responsible to his immediate landlord, in the first instance; but an under-tenant, in order to protect his possession, may always pay rent to the original lessor. And it is not necessary for his protection that the lessor should threaten a suit, or even demand the money; the right of the landlord to re-enter is sufficient to render the payment compulsory.¹ If the lessor dies after rent has become due, it is payable to his executor or administrator and not to the heir; but rent which accrues after the death of the lessor belongs to the heir and not to the executor or administrator.² An illustration of this principle occurs where a tenant for life, having granted leases in conformity to his power, died before midnight, though after sunset on the rent day; the remainder-man was declared to be entitled to the rent, because it followed the reversion, which descended to the heir-at-law before the rent became due.³

§ 391. **When Rent becomes due and payable.** — By the old law, rent became due and payable before sunset of the day whereon it was to be paid, so that sufficient light should remain to enable the parties to reckon the money; for anciently the day was accounted to begin only from sunrise, and to end immediately after sunset.⁴ But Lord Hale laid

¹ *Peck v. Ingersoll*, 7 N. Y. 528; see § 155, *ante*; *Collins v. Whilldin*, 3 Phila. 102. As regards rent in case of a mortgage by the lessor, see §§ 121 *et seq.*, *ante*.

² *Cole v. Patterson*, 25 Wend. 456; *Duppa v. Mayo*, 1 Saund. 287; *Barwick v. Foster*, Cro. Jac. 227; *O'Bannon v. Roberts*, 2 Dana, 54; *Dixon v. Nicolls*, 39 Ill. 372. So if an administrator collects rent, he holds it in trust for the heirs. *Robb's Appeal*, 41 Pa. St. 45; *King v. Anderson*, 20 Ind. 385; *McDowell v. Hendrix*, 67 Ind. 513; *Mills v. Merryman*, 49 Me. 65; *Rowan v. Riley*, 6 Baxt. 67. So where rent is payable in kind. *Cobel v. Cobel*, 8 Pa. St. 342; *Burns v. Cooper*, 31 *id.* 428.

³ *Norris v. Harrison*, 2 Madd. 268. But where rent was payable in kind, and the lessor died before the crops matured, the executor, and not the heir, was held entitled. *Wadsworth v. Alcott*, 6 N. Y. 64.

⁴ Co. Lit. 202, a. Where a lessee covenants to pay rent on particular days, the lessor's right to sue for rent in case of non-payment is extended or postponed beyond those days by the lessee's further covenant that the

down the rule, which has since been followed, that although sunset was the time appointed by law to demand rent, in order to take advantage of a condition of re-entry in case of its non-payment, or to tender it in order to save a forfeiture; yet that, in strictness, the tenant has all the day to pay it, so that it is not past due until after midnight, or the last minute of the natural day whereon it is payable.¹ For this reason, if a tenant is evicted by his landlord at any time of the day when rent is payable, it will operate as an extinguishment of the whole rent.² The day of payment generally depends upon the contract, but is sometimes regulated by custom. It may be made payable in advance;³ but if there is no special agreement to the contrary, payment will be due, either yearly, half-yearly, quarterly [or monthly], according to the usage of the country and the presumed intention of the parties. If there be no usage or agreement in the case, rent is not due until the end of the term.⁴ In the city of New

lessor may, after sixty days' default in payment, take and keep possession of the demised premises. *Rowe v. Williams*, 97 Mass. 163. A subsequent agreement may, by relation, operate to make a reservation of rent from this beginning. *McLeish v. Tate*, Cowp. 781. But parol evidence is not admissible to prove an additional rent payable by a tenant beyond that expressed in the written agreement. *Preston v. Merceau*, 2 W. Bl. 1249.

¹ *Duppa v. Mayo*, 1 Saund. 287; *Dalton v. Landahn*, 27 Mich. 529.

² *Smith v. Shepard*, 15 Pick. 147; *Hammond v. Thompson*, 168 Mass. 531.

³ *Giles v. Comstock*, 4 N. Y. 270; *Conway v. Starkweather*, 1 Den. 113. Where there was a stipulation for rent to commence at Michaelmas, and to be paid three months in advance on taking possession, held, that the stipulation applied only to the first quarter's rent. *Holland v. Palser*, 2 Stark. 161. A lease "from" April 1, rent payable April, July, October, and January 1, was held to intend payment of rent in advance. *Deyo v. Bleakley*, 24 Barb. 9. But where rent was to be paid in advance, but there was to be a discount if paid in five days, it was held not overdue till the five days ended. *White v. McMurray*, 2 Brewst. 484. As to payments in advance by a mortgagor's tenant, see §§ 119, 121, *ante*.

⁴ 8 Kent, Com. 874; *Menough's Appeal*, 5 W. & S. 432; *Raymond v. Thomas*, 24 Ind. 476; *Elmer v. Sand. Cr.*, 38 *id.* 56; *Campbell v. Hatchett*, 55 Ala. 548; *Tignor v. Bradley*, 82 Ark. 781. So where rent is payable in kind. *Dixon v. Niccolls*, 89 Ill. 872; *Lamberton v. Stouffer*, 55 Pa. St. 284.

York, in the absence of any special agreement, rent is payable on the usual quarter-days, by statute.¹ When payable in money, interest is generally allowed to be recovered upon rent in arrear from the time it became due.² But in North Carolina, it is held not to be recoverable by way of damages, in an action of debt for rent;³ nor in Louisiana, except from the time of the judicial demand.⁴ In Virginia, its recovery was held to depend upon circumstances to be determined by the jury; but it was not allowed where it appeared that there were effects upon the premises liable to distress, sufficient to satisfy the rent.⁵ Mississippi leaves it in the discretion of the court to allow interest or not, as it shall deem proper;⁶ while in New York, it was held that, in an action of covenant for the non-payment of rent, on a lease reserving a certain number of bushels of wheat and a number of fowls annually, the plaintiff was entitled to interest on the value of the property after the time when, by the terms of the lease, it should have been delivered.⁷ [If the rent is payable quarterly, or yearly, nothing is due until the time stipulated for payment arrives.⁸ In New York, if the lease specifies no

¹ Under a lease from the first of October to the first of May, at a yearly rent, payable quarterly, it was held that the rent was payable on the usual quarter-days, that is, one month's rent on the first of November, and thenceforth quarterly. *Wolf v. Merritt*, 21 Wend. 356. Otherwise held of a lease from the tenth day of the month, for a term of years to end on the first day of the month. *Curtiss v. Miller*, 17 Barb. 477.

² *Clark v. Barlow*, 4 Johns. 183; *Obermyer v. Nichols*, 6 Binn. 159; *Dorrill v. Stevens*, 4 McCord, 59; *Dennison v. Lee*, 6 Gill & J. 383; *Stockton v. Guthrie*, 5 Harr. 204; *McQuesney v. Hiester*, 33 Pa. St. 435. A tender of money does not extinguish the debt; it merely stops the running of interest. *Raymond v. Bearnard*, 12 Johns. 274; and see 2 N. Y. R. S. 554, § 20, and *Brown v. Ferguson*, 2 Den. 196.

³ *Cooke v. Wise*, 3 Hen. & M. 463; but may be from the time of commencing the action, or if the reception of the profits was tortious: *Benzein v. Robinett*, 2 Dev. Eq. 67.

⁴ *Perret v. Dupré*, 19 La. 341.

⁵ *Mickie v. Lawrence*, 5 Rand. 571; *Dow v. Adam*, 5 Munf. 21.

⁶ *Howcott v. Collins*, 23 Miss. 398.

⁷ *Van Rensselaer v. Jewett*, 5 Den. 135, 2 N. Y. 135; and see *Roush v. Emerick*, 80 Ind. 551; *Lush v. Druse*, 4 Wend. 313.

⁸ *Wood v. Partridge*, 11 Mass. 488; *Fitchburg Manuf. Co. v. Melven*, 15 id. 268; *McFarlane v. Williams*, 107 Ill. 88.

particular time of payment, an agreement to pay quarterly may be inferred from the fact that the lessor had demanded it quarterly, and the tenant had frequently so paid it.¹ In a reservation of rent "payable in quarterly or monthly payments," it was held that the alternative was for the benefit of the landlord, and not of the tenant.² On a lease in fee, payment of rent may be presumed after twenty years.³

§ 392. **Place of Payment of Rent.** — In regard to the place of payment, it is to be observed that, when rent in kind is payable by the terms of the lease at such a place in a market-town as the lessor shall appoint, and no appointment has been made, it is the duty of the lessee to seek the lessor, ascertain the place of payment, and there deliver his rent. If the landlord cannot be found, a delivery anywhere within the market-town would be sufficient. And whether payable in money, or in kind, if no place of payment is specified, a tender of either upon the land is good, and prevents a forfeiture.⁴ Although the tenant is not under obligation to seek the landlord, when the contract is silent as to the place of payment, a personal tender to the landlord, anywhere, is held sufficient.⁵ And when payable in kind, at such place as the lessor shall from time to time appoint, the lessor may sustain an action on the lease for the value of the rent, without averring or proving that he directed the lessee where to deliver it. But if, in

¹ *Long Island R. R. Co. v. Marquand*, 6 N. Y. Leg. Obs. 160.

² *Pemberton v. Van Rensselaer*, 1 Wend. 307.

³ *Lyon v. Odell*, 65 N. Y. 28.

⁴ *Lush v. Druse*, 4 Wend. 313; *Walter v. Dewey*, 16 Johns. 222; *Van Rensselaer v. Jones*, 5 Den. 453; *Fordyce v. Hathorn*, 57 Mo. 120. The effect of a valid tender of specific articles, where, by the terms of the contract, payment is to be so made, is to discharge the debt and transfer the ownership of the articles tendered to the creditor, notwithstanding he may refuse to accept it. *Des Arts v. Leggett*, 16 N. Y. 582; *Lamb v. Lathrop*, 13 Wend. 95. Thenceforward the lessee holds them as bailee, at the risk and expense of the other party. *Sheldon v. Skinner*, 4 Wend. 525; *Slingerland v. Morse*, 8 Johns. 477.

⁵ *Walter v. Dewey*, *supra*; *Slingerland v. Morse*, *supra*; *Hunter v. Leconte*, 6 Cow. 728; *Soward v. Palmer*, 8 Taunt. 277; *Tinckler v. Prentice*, 4 *id.* 549.

such a lease, the lessor gives directions where to make payment, the lessee must pay according to the directions.¹

§ 393. **Tender of Money for Rent. — How made. — When dispensed with.** — A tender of money is its actual production and manual offer to the party entitled to payment. It is not enough for the party to say, "I am ready to pay the debt, or perform the duty;" he must offer to pay the one or discharge the other.² He must declare on what account his offer is made, and actually produce the money, and not keep it in his pocket; but he may offer a bag with the money in it, and it is then the creditor's duty to examine and count it.³ The production of the money, however, may be dispensed with by the hostile conduct of the creditor; as, if he absolutely refuses to receive it; or, if he objects to receive it because it is too much, or because it does not amount to the debt due, together with another debt which he also insists on receiving at the same time; or, where he tells the party he need not produce the money.⁴ But the circumstance of demanding more than is due is not sufficient to excuse tender of what is due.⁵ Tender must be without qualification or condition, or intention of cutting off some other claim beyond the amount tendered; as, if the debtor, at the time of the tender, demands a receipt in full of all demands; although he may ask a written receipt or acknowledgment for the amount paid.⁶ The tender ordinarily must be made directly

¹ *Livingston v. Miller*, 8 N. Y. 283; s. c. 11 *id.* 80. See § 565, *post*.

² *Bakeman v. Pooler*, 15 Wend. 637; *Sheredine v. Gaul*, 2 Dall. 190; *Horn v. Luines*, 12 Mod. 353; *Dunham v. Jackson*, 6 Wend. 22. There is no tender if the money has been fraudulently obtained. *Reed v. Bank of Newburgh*, 6 Paige, 337.

³ *Bakeman v. Pooler*, *supra*; *Dickinson v. Shee*, 4 Esp. 68; *Glancott v. Day*, 5 *id.* 48; *Sheredine v. Gaul*, *supra*; *Wade's Case*, 5 Co. 115; 1 Inst. 208; *Firth v. Purvis*, 5 T. R. 432.

⁴ *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith*, Peake, 88; *Stone v. Sprague*, 20 Barb. 509; *Holmes v. Holmes*, 12 *id.* 137; *Vaupell v. Woodward*, 2 Sandf. Ch. 143.

⁵ *Dunham v. Jackson*, 6 Wend. 22; *Thomas v. Evans*, 10 East, 101; *Kraus v. Arnold*, 7 Moore, 59.

⁶ *Wood v. Hitchcock*, 20 Wend. 47; *Ryder v. Townsend*, 7 Dow. & R. 119; *Fishburne v. Saunders*, 1 Nott & M. 242. A tender upon condition

to the creditor; and if made to an agent or other person, it must be shown that he had authority to receive it.¹

§ 394. **Tender of Specific Articles. — Of Coin. — Of Bank-notes.** — As to a tender of specific articles, the party making the tender must do everything in his power to place himself in a state of readiness to perform, or the tender will not be complete, whether the creditor be present or not.² It is a general rule, applicable to all cases of tender, that where any act yet remains to be done to prepare the goods for delivery, the property does not pass until that act has been done; for the essential object of identifying the goods and giving the creditor a remedy by caption, trover, or otherwise to obtain the goods or the value of them, is not yet obtained. And this is essential, for the party should not be deprived of all remedy upon his contract, unless another remedy is furnished him by passing the property of the chattels, and placing them completely under his control.³ Strictly, a tender must be made in gold and silver coin made current by acts of Congress of the United States.⁴ Such coin as is issued from

that certain securities be surrendered to which the debtor is not entitled, or that the holder of the obligation will ratify an arrangement made concerning another matter, is bad. *Brooklyn Bank v. Degrauw*, 23 Wend. 342; *Eddy v. O'Hara*, 14 Wend. 221.

¹ *Hornby v. Cramer*, 12 How. Pr. R. 490; *Smith v. Smith*, 2 Hill, 351; *Hargous v. Lahens*, 3 Sandf. 213. If the creditor, knowing the day on which payment ought to be made, absents himself from home on that day with intent to avoid the debtor, a tender by the latter to any person whom he may find at the creditor's house, is good. *Judd v. Ensign*, 6 Barb. 258; *Smith v. Smith*, 25 Wend. 405.

² *Clark v. Tyson*, 1 Stra. 504; *Coit v. Houston*, 3 Johns. Cas. 253, per Radcliff, J. And an agreement for a certain time to take money instead of such articles, will not discharge such a covenant. *Lilley v. Fifty Assoc.*, 101 Mass. 432.

³ *Newton v. Galbraith*, 5 Johns. 119; *McDonald v. Hewett*, 15 *id.* 351; *Whitehouse v. Frost*, 12 East, 621; *Wallace v. Breeds*, 13 *id.* 522; *Nichols v. Whiting*, 1 Root, 443.

⁴ By the Act of Congress, of March 3, 1863, treasury notes of the United States were made legal tender, and it was repeatedly held under this act that all contracts, including those specifically agreeing for gold or silver coin, could be discharged either in law or equity by these notes at par. *Thomson v. Riggs*, 5 Wall. 663; *Frothingham v. Morse*, 45

the mint may be counted, and the creditor must take it according to its nominal value. But, with regard to foreign coin, the creditor may decline to receive it, except by its true weight and value. Bank-notes constitute a part of the currency of the country, and ordinarily pass for money, and a contract will, in the absence of proof to the contrary, be presumed to have been made with reference to the currency in which business is usually transacted.¹ When bank-notes are received in payment, the receipt is to be given for them as money; and they are a good tender as money unless specially objected to by the creditor at the time of the tender.²

N. H. 545; *Wood v. Bullens*, 6 Allen, 516; *Buchegger v. Shultz*, 13 Mich. 420; *Graham v. Marshall*, 52 Pa. St. 28; *Thayer v. Hedges*, 23 Ind. 141; *Whetstone v. Colley*, 36 Ill. 328; *Henderson v. McPike*, 35 Mo. 255. The U. S. Supreme Court, however, overruled these decisions, in *Bronson v. Rodes*, 7 Wall. 229, and held that contracts specifically for coin can be discharged only in coin, or in currency with the premium; and this was followed in *Butler v. Horwitz*, *id.* 258. The rule had, however, always prevailed that where the contract was for gold or silver, not as money, but by weight, it became a commodity, and not a currency, and could only be satisfied by gold or silver, or by currency with the premium added. *Essex Co. v. Pacific Mills*, 14 Allen, 389, where a perpetual annual rent was reserved of 260 ounces of silver of a specified fineness. So *Dutton v. Pailaret*, 52 Pa. St. 109; *Sears v. Dewing*, 14 Allen, 413.

¹ *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

² *United States Bank v. Bank of Georgia*, 10 Wheat. 317. Counterfeit notes, or notes which prove to be of no value, are not a payment, although they were paid in good faith and supposed to be genuine. *Markle v. Hatfield*, 2 Johns. 455; but see *Benedict v. Field*, 4 Duer, 154. When a bank stops payment, its bills cease to be a representative of the legal currency, whether the holder is aware of the suspension or not. If such bills are passed to one who is ignorant of the failure of the bank, they are no payment. *Ont. Bank v. Lightbody*, 13 Wend. 101. That the creditor may return a counterfeit bank-note, in a reasonable time, see *Thomas v. Todd*, 6 Hill, 340. It is held in Pennsylvania that a landlord cannot forfeit a lease merely because payment of rent is tendered by check, where it appears that checks had been tendered on two prior occasions for monthly instalments, and had been refused, not because the tender was illegal, but for other reasons then stated. *Pershing v. Feinberg*, 203 Pa. 144.

SECTION III.

THE COVENANT TO PAY TAXES, CHARGES, AND ASSESSMENTS.

§ 395. **Tenant liable to pay; Landlord to reimburse.** — As a general rule, the tenant is liable in the first instance to pay all taxes imposed upon the demised premises. The land itself, in the hands of the occupant, is in fact debtor to the public, and *prima facie* it is the tenant's tax, because the remedies are against him. He is, therefore, for his own protection, authorized to pay all such taxes and assessments, laid upon the premises for public improvements, as may be demanded of him, and to charge them to account of rent.¹ And the landlord is bound to indemnify the tenant against such charges as the latter has been obliged to pay, and for which the landlord is ultimately liable.² When, therefore, a tenant has paid the tax, ground-rent, assessment, or other preferred charge on the land, he may look to the landlord for it, and recover the amount thereof in a suit at law, or deduct it out of the rent; unless it is provided by the lease that the tenant shall pay it as part of or in addition to the rent; or unless the statute makes the tenant finally liable for it.³ Nor is it necessary, to render the payment by the tenant involuntary, that the superior lord [i. e. the State] should threaten to distrain, for a demand, by one who has power to enforce his claim, is equivalent to compulsion; and such a payment is said to be no more voluntary than a donation to a beggar who presents a pistol.⁴ And if the sum paid by the tenant exceeds the rent due, the landlord will be

¹ *Tinckler v. Prentice*, 4 Taunt. 549; *Gabell v. Shevell*, 5 Taunt. 81. It would seem that, in Maryland, if no mention is made of taxes in the lease, they are payable by the tenant, and do not constitute a set-off to the payment of rent. *Hughes v. Young*, 5 Gill & J. 67.

² *Sapsford v. Fletcher*, 4 T. R. 511; *Stubbs v. Parsons*, 3 B. & A. 516; and see § 341, *ante*.

³ *Hunt v. Amidon*, 4 Hill, 349; *Taylor v. Zamira*, 6 Taunt. 524; *Clennell v. Read*, 7 *id.* 50; *Dawson v. Linton*, 5 B. & A. 521; *Ward v. Const*, 10 B. & C. 635; *Garner v. Hannah*, 6 Duer, 262.

⁴ *Carter v. Carter*, 5 Bing. 406.

bound to repay such excess, as being money paid by the tenant to his use.¹

§ 396. **English Rule as to Yearly Taxes.** — By the English law, a tenant must deduct each year's tax from each year's rent; for, if the deduction is not made from the rent of the current year, the tenant will not be allowed to deduct, in any subsequent year, the amount of the tax so omitted to be deducted.² And, therefore, where an occupant of lands, during a period of twelve years, paid to the collector the landlord's property-tax; and the full rent as it became due to the landlord, without claiming any deduction on account of the tax; he was not permitted to set off any part of the property-tax in the landlord's action for rent.³ And although he may recover such payments from the landlord by a separate action,⁴ he cannot do this if he has paid thereafter his rent in full to his landlord without compulsion or objection. Such a payment will be treated as a voluntary one, with full knowledge of the facts, and so not recoverable.⁵

§ 397. **Tenant's Covenant to pay. — Public Duties, &c.** — But the obligation to pay taxes strictly so-called, or other permanent charges or assessments, may be assumed by the tenant by express covenant.⁶ Where the tenant's covenant is only

¹ *Taylor v. Zamira, supra*. This refers only to what the landlord is ultimately to pay. By the statutes imposing the land-tax or property-tax, the tenant can only deduct according to the proportion borne by the rent to the annual value; the excess of this the tenant is to bear. *Watson v. Home*, 7 B. & C. 285; *Ward v. Const*, 10 *id.* 635, 649.

² *Stubbs v. Parsons*, 3 B. & A. 516; *Andrew v. Hancock*, 1 Brod. & B. 37; *Spragg v. Hammond*, 2 *id.* 59.

³ *Denby v. Moore*, 1 B. & A. 123. But an agreement by the landlord for sufficient consideration to repay the property-tax paid by the tenant is not invalid. *Lamb v. Brewster*, 4 Q. B. D. 220. This restriction of the tenant's right to deduct the tax only from the current year's rent does not exist in the statutes of the several States; but a right to deduct "from any rent due" is generally given, and the statutes give also a right of recovery by action against the landlord for the amount of the taxes so paid.

⁴ *Baker v. Greenhill*, 8 Q. B. 148.

⁵ *Denby v. Moore, supra*; *Cumming v. Bedborough*, 13 M. & W. 558.

⁶ *Payne v. Burrridge*, 12 M. & W. 72; *Parish v. Sleeman*, 1 De G., F.

to pay rates, taxes, or public dues; while the ordinary annual taxes are included,¹ it has been held that he is not liable to an assessment of an extraordinary or unusual character, or for a permanent improvement enuring to the benefit of the reversion.² Thus, a tax upon the rent reserved is not a tax which he is bound to discharge under a general covenant to pay taxes.³ Nor under a covenant to pay rent over all taxes, charges, or impositions is he held for any tax imposed upon the owner not in respect of the land.⁴ And even where the language of the covenant is to pay all taxes and assessments, the tenant is not bound to pay the tithe rent-charge, which is never intended by these words, and is only payable by the

& J. 326; *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. St. 807, where the covenant was to pay for the gas consumed on the premises, and it was held that sums due for such gas might be distrained for as rent. In Massachusetts, by construction of the statute, it is held that the lessee in order to prevent a forfeiture of his estate after notice to quit for non-payment of rent, need not tender with the rent the taxes due, and which the lessor has paid in order to prevent a tax-sale of the premises; although the lease contains a covenant that the lessee shall pay the taxes. *Hodgkins v. Price*, 137 Mass. 13. The lessee's omission to pay a municipal assessment is not a breach of the covenant if the omission arises from a question as to the validity of the assessment, and he pays it when such validity is established. *Eberts v. Fisher*, 54 Mich. 294.

¹ *Garner v. Hannah*, 6 Duer, 262.

² *Twycross v. Fitchburg R. R.*, 10 Gray, 293; *Balling v. Stokes*, 2 Leigh, 178; *Munic. No. 2 v. Curell*, 13 La. 318; *Beals v. Prov. R. R.*, 11 R. I. 381. In *Love v. Howard*, 6 *id.* 116, the same rule was applied, though the covenant included "assessments" *eo nomine*; but the case goes mainly on the ground that the act imposing the assessment preceded the lease, and it could not have been in the contemplation of the parties. See *De Clercq v. Barber Asphalt Paving Co.*, 167 Ill. 215. To the same effect are the cases in which an exemption from taxation has been held not to include an assessment for a permanent benefit, or one accruing solely to the reversion. *Second Cong. Soc. v. Providence*, 6 R. I. 235; *Matter of College St.*, 8 *id.* 474. It is here held that while laying an assessment either for the expense of an improvement, or for the assumed benefit resulting from it to an estate, is an exercise of the taxing power, yet it is not a tax in the ordinary sense, but in the nature of a return of a benefit conferred. In *Harvard College v. Boston*, 104 Mass. 476, the terms of exemption were broader, and an assessment for a betterment was held to be included under the words "civil imposition."

³ *Van Rensselaer v. Dennison*, 8 Barb. 23.

⁴ *Palmer v. Power*, 4 Ir. C. L. 191.

tenant when the landlord is to receive his rent free of all "outgoings."¹ So, where the terms of the statute imposing the assessment are limited to the owner, the tenant will not be liable for a permanent improvement, even under a covenant by which he agrees to pay all taxes, rates, assessments, and impositions.²

§ 398. **Covenant to pay all Taxes. — Construction of. —** But where the tenant has covenanted to pay all taxes, and that the landlord shall get his rent free from all deductions; the tenant will be held to assume absolutely all such taxes as he otherwise might have paid and thereafter have recovered from the landlord or deducted from the rent.³ And although the permanency of the improvement which is the ground of the assessment is a proper element in determining on whom the burden shall fall,⁴ this consideration will not exempt the

¹ *Jeffrey v. Neale*, L. R. 6 C. P. 240. Where the lessee of an incorporated gas company covenanted to pay all assessments and taxes lawfully assessed upon the "real or personal property, franchises, capital stock or gross receipts" of the lessor, it was held that the lessee was not liable for a tax levied by the State upon dividends of the gas company. *Jersey City Gas Co. v. United Gas Imp. Co.*, 17 U. S. App. 170.

² *Tiddswell v. Whitworth*, L. R. 2 C. P. 326; *Rawlins v. Briggs*, 3 C. P. D. 368; *Hartley v. Hudson*, 4 *id.* 367; *Budd v. Marshall*, 5 *id.* 481; *Weber v. Reinhard*, 73 Pa. St. 370; *Twycross v. Fitchburg R. R.*, *supra*; § 398, *post*. The mere lessee for ten years is not the "owner" of the property within the meaning of a statute to enforce a sewer assessment. *Davis v. Cincinnati*, 36 Ohio St. 24.

³ Thus, in *Bennett v. Womack*, 3 C. & P. 96, 7 B. & C. 627, agreeing to take a lease at a net rent binds him to pay the land-tax and sewers rate, which are properly the landlord's taxes. So where he verbally agrees to pay "all taxes," he is bound to pay the land-tax, though it is not specially mentioned. *Amfield v. White*, Ry. & M. 286. And where in addition to the covenant to pay taxes, he is to pay the landlord his rent "free of all outgoings," the tenant must bear the tithe-rent charge, which by law he is to pay in the first instance and then deduct. *Parish v. Sleeman*, 1 De G., F. & J. 326. The covenant to pay taxes is an agreement to pay them as part of the rent. *Gedge v. Shoenberger*, 83 Ky. 94; *McKeever v. Beacon*, 101 Iowa, 173; *Chicago v. English*, 180 Ill. 476.

⁴ See *Payne v. Burrige*, 12 M. & W. 72; *Sweet v. Seager*, 2 C. B. N. s. 119. In *Thompson v. Lapworth*, L. R. 3 C. P. 149, Willes, J., said: "The substance of the argument is this, that the duties intended by this covenant are not occasional or exceptional expenses incurred once for all

tenant if his covenant refers specially to the kind of assessment;¹ or includes all assessments;² or is to hold the landlord free from all deductions of rent.³ And if the tenant's covenant includes all burdens during the term, he is liable, even although the assessment is not laid or the law imposing the assessment is not passed until after the lease is made.⁴ [But the covenant does not extend to general taxes payable during the term but assessed before its commencement.⁵] It is held in Massachusetts that, under his covenant to pay taxes and assessments, the tenant is liable not merely for the expense of the improvement, but for a proportion of the betterment so-called; that is, of the assumed benefit resulting to the whole estate, including the reversion, from the improvement;⁶ even when the covenant is, to pay "taxes and duties" only.⁷ But the tenor of American and English authority is

in respect of permanent and substantial improvements, but duties or assessments accruing from year to year, or occasionally matters of a recurring character. The argument is a strong and captivating one, and one to which I might have yielded if it had not been excluded by decisions which ought to bind us." And in *Crosse v. Raw*, L. R. 9 Exch. 309, Bramwell, B., said: "I go a long way with the argument which my brother Willes described, in *Thompson v. Lapworth*, as a captivating one, that the landlord may be liable for what may be called capital expenditure, but not for expenditure which should be charged to revenue."

¹ *Waller v. Andrews*, 8 M. & W. 312.

² *Bleecker v. Ballou*, 8 Wend. 263; *Mayer v. Cushman*, 10 Johns. 96; *Oswald v. Gilfert*, 11 *id.* 443; *Clemens v. Knox*, 31 Mo. App. 186; *Codman v. Johnson*, 104 Mass. 491; *Payne v. Burrige*, *supra*; *Aster v. Miller*, 2 Paige, 68.

³ *Parish v. Sleeman*, *supra*.

⁴ *Post v. Kearney*, 2 N. Y. 394; *Des Moines v. Dorr*, 31 Iowa, 89; *Curtis v. Pierce*, 115 Mass. 186.

⁵ *McManus v. Shoe & Leather Co.*, 60 Mo. App. 216; § 399, *post*.

⁶ *Codman v. Johnson*, *supra*; *Walker v. Whittemore*, 112 Mass. 87.

⁷ *Simonds v. Turner*, 120 Mass. 188. It is noticeable how the terms have been narrowed which are held to subject the tenant to this extraordinary liability. In *Codman v. Johnson*, *supra*, the judgment was rested in some degree on the facts that the covenant was to pay *assessments*, that the lease was for twenty years, and was made after the statute imposing the burden; and hence that an assessment for a permanent benefit might well have been in contemplation. In *Curtis v. Pierce*, the statute was after the lease; but the covenant was broad, and the lease was for ten years. In *Blake v. Baker*, 115 Mass. 188, however, the lease was but for

the other way, and in one case even the word "assessments" in the covenant was held insufficient to subject the tenant to this burden.¹ [The distinction between "taxes" and "assessments" is that while in a general sense the word "taxes" includes special assessments; yet these latter constitute a peculiar class of taxes which are laid upon property benefited according to some equitable rule; while taxes, generally, are burdens imposed by the government for the expenses of government; and a promise by a lessee of real estate to pay all taxes upon the property does not apply to special assessments, as for the construction of a sewer.² The covenant to pay taxes runs with the land and is divisible.³]

three years, though made indeed after the passage of the statute; and the covenant was to pay *taxes or duties* only. Finally, in *Simonds v. Turner*, the tenant was held liable under a covenant to pay *taxes and duties* for an assessment for a betterment of a character unknown when the lease was made, imposed by a statute passed after the date of the lease, and when this had but a few years to run. The words of the covenant in this case may be compared with those in the leases in *Sweet v. Seager*, *Payne v. Burrige*, or *Thompson v. Lapworth*, *supra*, or with the language of the court in *Harvard College v. Boston*, 104 Mass. 471, 483: "In a lease for years, especially if for a short term, containing a covenant that the tenant shall pay all taxes assessed upon the premises, it would hardly be supposed that the parties intended that the lessee should pay an extraordinary assessment laid upon the premises, in view of the permanently increased value of the estate by reason of a public improvement in the vicinity, unless the terms used were such as to admit of no other construction."

¹ *Love v. Howard*, 6 R. I. 116; *Sharp v. Speir*, 4 Hill, 76; *Pray v. North. Lib.*, 31 Pa. St. 69; *Matter of the Mayor*, 11 Johns. 77; and cases cited § 397, *ante*.

² *Ittner v. Robinson*, 35 Neb. 133, and see *Matter of Mayor of N. Y.*, 11 Johns. 77. The expenses of paving, &c., a street, recovered in a summary manner, by an urban authority, from the owner of premises outside the metropolis, under a statute, cannot be recovered by the owner from his tenant, under a covenant by the tenant to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises." *Baylis v. Jiggins*, 1898, 2 Q. B. 315. See *Wix v. Rutson*, 1899, 1 Q. B. 474. But a covenant to pay taxes and "impositions charged and imposed on the landlord, tenant or occupier," includes the expense of removing a nuisance by public authority. *Foulger v. Arding*, 1902, 1 C. A. 700.

³ *Hendrix v. Dickson*, 69 Mo. App. 197; *Ellis v. Bradbury*, 75

§ 399. **Taxes relate to assumed Day of Valuation. — Lessor's Remedy for Non-payment of.** — A tax is in legal contemplation assessed and becomes a debt on the day the property is assumed to be valued, although the actual work of assessment is not completed until long after; and the tax is legally payable from that day. A covenant, therefore, to pay all taxes payable during the term includes a tax laid before the term expires, although the day of its levy or actual payment falls without the term;¹ and the rule is the same although the expense which the tax is collected to meet was incurred before the lease began.² Upon the lessee's neglect to pay, a cause of action at once accrues to the lessor, and he may either pay the tax and sue the lessee for the amount,³ or may sue without first paying it.⁴ Hence, if the premises are destroyed, the obligation to pay the taxes still continues and binds the lessee,⁵ even though the lease contains an agreement by the lessor to rebuild, and a stipulation for abatement of the rent until this is done.⁶ And although the lease is terminated after the day when the tax becomes a debt, no apportionment takes place for the yet unexpired portion of the tax year.⁷

Cal 234. See *Stimson v. Crosby*, 180 Mass. 296. But it is held that a provision that the tenant shall pay all water rents taxed, levied, or charged on the demised premises during the term, does not apply to one of several tenants of a building or block where the water tax assessment is in bulk against the entire block. *Kingsbury v. Powers*, 181 Ill. 182.

¹ *Wilkinson v. Libby*, 1 Allen, 375; *Amory v. Melvin*, 112 Mass. 83; *Waterman v. Harkness*, 2 Mo. App. 494; § 398, *ante*.

² *Shepardson v. Elmore*, 19 Wis. 424.

³ *Hackett v. Richards*, 3 E. D. Smith, 13. The payment by the lessor of the amount of a paving assessment which the lessee is bound to pay is not a condition precedent to an action by him to recover the amount thereof from the lessee; the rule that a surety has not a right of action against his principal until he has paid the debt not applying. *Vorse v. Marble, &c. Co.*, 104 Iowa, 541.

⁴ *Trinity Church v. Higgins*, 48 N. Y. 532.

⁵ *Wood v. Bogle*, 115 Mass. 30; *Paul v. Chickering*, 117 *id.* 265; *Sargent v. Pray*, *id.* 267.

⁶ *Minot v. Joy*, 118 Mass. 308.

⁷ *Paul v. Chickering*, *Wood v. Bogle*, *Sargent v. Pray*, *supra*; *Carnes v. Hersey*, 117 Mass. 269; *Howe v. Bryant*, *id.* 273, n.

But where the terms of the covenant are only to pay taxes "levied" during the term, a tax assessed only will not be included.¹

SECTION IV.

THE COVENANT TO INSURE.

§ 400. **Not an Implied Covenant. — Is a Personal Obligation. — Construction of.** — A covenant is sometimes inserted in a lease requiring the tenant to insure the premises, and in case of damage by fire, to apply the money received for insurance in rebuilding or repairing the premises. Without such a covenant, the tenant is under no obligation to insure; although, if it is a long lease, without exception as to casualties, he may find it prudent to do so. The bare covenant to insure is personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and, in general, gives the landlord no right to receive the insurance-money; but when it contains a clause for reinstating the premises with the insurance-money, he may not only require it to be so applied, but it becomes a covenant, running with the land and enabling the assignee of the reversion to maintain an action for its breach.² And a similar effect will be given to this covenant wherever a statute requires the money to be so applied.³ A covenant to insure and keep insured the premises, in a certain amount during the term, in some sufficient insurance office, intends insurance in some office where insurances against fire are usually effected; ⁴ not that the lessee shall effect any one policy, and keep that particular one on foot, but that he, his executors and assigns, shall always keep the premises insured in the required amount by one policy or another; and this covenant will be broken if the premises are left uninsured for any time, however short.⁵

¹ *Valle v. Fargo*, 1 Mo. App. 344; *Doane v. Fallon*, 3 *id.* 596.

² *Northern Trust Co. v. Snyder*, 46 U. S. App. 179.

³ *Thomas v. Von Kapff*, 6 Gill & J. 372; *Vernon v. Smith*, 5 B. & A. 1; *Spencer's Case*, 5 Co. 17; *Masury v. Southworth*, 9 Ohio St. 340.

⁴ *Doe v. Shewin*, 3 Camp. 135. See *Quincy v. Carpenter*, 135 Mass. 102.

⁵ *Doe v. Peck*, 1 B. & Ad. 428. A change of tenants of the insured

§ 401. **With Covenant to keep in Repair, Effect of.** — If the tenant covenants to keep the premises in repair, and also to insure them for a specific sum against fire; on their being burned down his liability on the former covenant is not limited to the amount of the sum insured under the latter, but he is bound to put the premises in as good order as they were in when he accepted the lease, notwithstanding the sum insured may not be sufficient for that purpose.¹ Where the defendant covenanted to keep the premises insured during the term, and the policy provided that fifteen days beyond the quarter-day should be allowed for the payment of the premium, and he suffered the fifteen days to elapse before it was paid, but insured afterwards; the covenant was held to be broken; since the landlord ran the risk of fire from the fifteenth day to the time the insurance was renewed.² A forfeiture for the breach of this covenant will not, in general, be relieved against in equity, unless there has been a waiver of the forfeiture, as by a subsequent receipt of rent; and, on the non-performance of the covenant, the lessor may enter as for the breach of a condition, if such right has been reserved in the lease, and oust the assignee of the lessee, even although he has distrained for rent with knowledge of the breach of the covenant, which would be a waiver of the breach up to the time of distress; for the subsequent non-insurance is held to be a continuing breach up to that time, and gives a right of re-entry for the forfeiture.³

building, the policy being silent on the subject, does not invalidate the policy, though the first tenant may be a prudent, and the second a grossly careless, man. *Gates v. Madison Ins. Co.*, 5 N. Y. 469.

¹ *Digby v. Atkinson*, 4 Camp. 275. A covenant to keep a factory insured includes an obligation to keep the fixed machinery necessary to the operations of the factory insured. *Mayhew v. Hardesty*, 8 Md. 479.

² *Doe v. Shewin*, 3 Camp. 135. Where the covenant requires the tenant to keep the building insured in a certain sum, for the benefit of the landlord, an insurance effected by the lessee in his own name and for his own benefit is no compliance with the covenant. *Keteltas v. Coleman*, 2 E. D. Smith, 408.

³ *Doe v. Peck*, 1 B. & Ad. 428. As a breach of this covenant is a continuing breach, the receipt of rent by the landlord waives only the breach which has then actually occurred. *Doe v. Gladwin*, 6 Q. B. 953. In this case, the tenant had covenanted to insure the demised premises, and to

SECTION V.

THE COVENANT NOT TO ASSIGN OR UNDERLET.

§ 402. **Not an Implied Covenant. — Usually inserted in Lease.**
— The power of assignment is incident to the estate of every lessee, unless it is restrained by the terms of the lease.¹ But a covenant not to assign or underlet the premises without the express permission of the landlord, accompanied by a clause of re-entry in case of breach, is frequently inserted in a lease.² And although it seems to be reasonable that a lessor shall exercise this restraint, for the purpose of selecting such tenants as will take care of his property and pay rent punctually, it is a restraint which [formerly] the courts of law did not favor.³ In some cases the restriction extends to the whole term; in others, to a limited time only, such as for the last year of the term, or for the last two or three years; so that the lessor may find, on the determination of the lease, a responsible person in possession of the property, to whom he may look for rent. [The covenant against assignment being keep them insured in the joint names of the landlord and of himself, and the lease contained a proviso for re-entry upon the breach of any covenant. The tenant insured in his own name, but showed the policy to the landlord, who approved it, and accepted rent during the next three years up to Christmas, 1842. The premiums already paid by the tenant covered the year 1843. In January, 1843, the landlord assigned his reversion, and in that year the assignee brought ejectment for the forfeiture caused by the non-insurance in the joint names of the landlord and tenant; and it was held that the lease was forfeited, although no notice had been given to the tenant to alter the policy. See also *Penniall v. Harborne*, 11 Q. B. 368; *Doe v. Ulph*, 13 *id.* 204. An existing breach by failure to insure is a defect in the title, although the lessor has not taken advantage of it. *Wilson v. Wilson*, 14 C. B. 616. Nor will equity relieve. *Gregory v. Wilson*, 9 Hare, 683.]

¹ *Greenaway v. Adams*, 12 Ves. 395. The power exists without the use of the word "assigns" in the lease. *Ibid.*

² When the lease contains such a covenant, equity will not compel the lessee to execute his agreement to assign to a third party, for such party must treat the lease as subsisting, including the covenant. *Willmot v. Barber*, 15 Ch. D. 96.

³ *Church v. Brown*, 15 Ves. 265; *Crusoe v. Bugby*, 1 W. Bl. 766; *Cooney v. Hayes*, 40 Vt. 478; *Den v. Post*, 1 Dutch. 285.

for the benefit of the lessor only, an assignment made without his consent is not void, but voidable merely.¹ And the assignment does not work a forfeiture without a declaration to that effect, contained in the lease.²]

§ 403. **Express Covenants strictly construed.** — Covenants of this description are construed by courts of law with the utmost strictness, to prevent the restraint from going beyond the express stipulation.³ If, therefore, the lessee covenants “not to assign, transfer, set over,” or otherwise do, or put away, the lease or premises, this does not prevent him from underletting.⁴ Nor will a covenant “not to let or underlet the whole or any part” of the demised premises preclude an assignment of the whole interest.⁵ But a condition not to “set, let, or

¹ Webster v. Nichols, 104 Ill. 160.

² Eldredge v. Bell, 64 Iowa, 125; and see § 492, *post*. A provision for re-entry in case of assignment existed in many of the manor leases in New York. It consisted in a reservation to the proprietor of the quarter-sales, and a pre-emption right upon every alienation made by the tenants. This reservation in fact constituted a part of the consideration of the original purchase of the premises, nothing having been paid by the tenants upon their receiving the grant of their lands from the patroon. Reservations of fines or quarter-sales were prohibited in New York, by the Constitution of 1846.

³ Doe v. Carter, 8 T. R. 61. Thus, a covenant not to assign for benefit of creditors is not broken by an assignment not for creditors. Phila. & E. R. R. v. Catawissa R. R., 53 Pa. St. 20. Ignorance on the part of the assignee of the restriction will not prevent the forfeiture. Ind. & M. Union v. C. C. C. & S. R. R., 45 Ind. 201. The value of agricultural leases depends so much upon the character of the tenants that, in Scotland, these cannot be assigned or sublet without the landlord's consent; but the lease of a city tenement is assignable, or may be underlet, unless there be a prohibitory clause. 1 Bell, Com. 75.

⁴ Jackson v. Silvernail, 15 Johns. 278; Jackson v. Harrison, 17 *id.* 66; Crusoe v. Bugby, 3 Wils. 234; Hargrave v. King, 5 Ired. Eq. 430; Copland v. Parker, 4 Mich. 660; Leduke v. Mark, 47 *id.* 158.

⁵ Lynde v. Hough, 27 Barb. 415. But the authorities are not agreed on this point. In Den v. Post, 1 Dutch. 285, a covenant against underletting was declared a bar to assignment, citing Greenaway v. Adams, 12 Ves. 395. But this case is qualified by Field v. Mills, 33 N. J. 254. In Blake v. Sanderson, 1 Gray, 332, Shumway v. Collins, 6 *id.* 227, 230, Shattuck v. Lovejoy, 8 *id.* 204, Bemis v. Wilder, 100 Mass. 446, the court treat the covenant against underletting as if it were a bar to as-

assign over" the demised premises, or any part thereof, prohibits under-leases; and where the condition was, not to let or assign the premises, or any part thereof, a lease by the tenant, which fell short of his term by only one day, was held to be a breach of the condition.¹ So a covenant not to let, set, or demise the premises, or any part thereof, for the whole or any part of the term, restrains an assignment.² And where the proviso in the lease was that "if the lessee, his executors, or administrators, did or should assign, or otherwise part with, the lease or the premises thereby granted, or any part thereof, 'for the whole or any part of the term thereby granted,' to any person or persons whomsoever, without the license and consent, in writing, of the lessor, first had and obtained for that purpose, the lessor might re-enter," and the lessee entered into an agreement with another, to grant him a lease of the premises for the residue of the term, reserving a few days, under which possession was given; Lord Ellenborough held that an under-lease was a breach of the proviso.³ [It is to be observed that the lessor's waiver of a forfeiture incurred by underletting is a ratification of the lessee's act, and makes the occupation of the under-tenant legal.⁴]

signing, but the distinction was not noticed; and, notwithstanding the covenant, the assignment in each case was sustained. These cases cannot be regarded as in point. In *Greenaway v. Adams*, *supra*, the words were "not to set, let, or demise." The court say, p. 400, "It would be strange if a lessor should restrain a partial and not total alienation." This is mere *dictum*; and it would be sufficient reason for such restriction, that a lessor has no recourse against an under-tenant, but, on an assignment, has his remedy against the assignee and lessee at the same time. But the decision was correct on the words used in the covenant, the word *set* being construed to mean an assignment. 2 Platt, Leases, 259; 1 Smith, L. C. 91. There seems, therefore, no good authority against the proposition in the text. A covenant not to underlet in which covenantor's assigns are not named, does not bind an assignee. 4 Kent, Com. 130; *Dumpor's Case*, 4 Co. 119; 2 Cruise, Dig. 7.

¹ *Roe v. Harrison*, 2 T. R. 425; *Roe v. Sales*, 1 M. & S. 297.

² *Greenaway v. Adams*, 12 Ves. 395. But a lease, if for the whole term, would be an assignment. *Field v. Mills*, 33 N. J. 254, and § 16, *ante*. But in *People v. Robinson*, 2 N. Y. 394, a different view is taken where there is a clause of re-entry. *Crusoe v. Bugby*, 3 Wils. 234.

³ *Doe v. Worsley*, 1 Camp. 20.

⁴ *Smith v. Englewood Casino Club*, 19 R. I. 628; *Shattuck v. Love*

§ 404. **Covenant for Right of Pre-emption.** — A covenant in a lease in fee, that, if the lessee or his assigns should sell, the lessor shall have the right of pre-emption and be entitled to receive one-tenth of the purchase-money, was formerly held to be a valid covenant; the estate was declared forfeited if that was made a condition of the breach of it; and it ran to and bound the lessee's assignee, even by operation of law.¹ But to impose a valid condition upon a grantee it is necessary that the grantor should retain some reversionary interest, and it was accordingly held, both at law and in equity, that in a lease in fee such a right of pre-emption was invalid, being against public policy as a restraint upon alienation on a grant in fee.²

§ 405. **Gratuitous Underletting. — To Partners. — To Lodgers.** — Where a lease provided that the landlord might re-enter in case the tenant should let the premises or any part thereof, or should convey them to any person whatsoever for all or any part of the term, without the license of the lessor; and the tenant, without such license, took a third person into copartnership with him, and agreed to let him the back chamber with some other part of the premises exclusively and the rest of the premises jointly with the lessee, and he was let into possession; this was held to be a breach of the proviso, whether the possession was given gratuitously or for rent.³ But a covenant not to underlet without the consent of the lessor does not apply to a mere change in the business of the lessee's firm, incident to the admission of a new partner or the withdrawal of an old one.⁴ Nor is it broken by taking

joy, 8 Gray, 204. *Aliter* as to a subsequent breach of condition. *Farr v. Kenyon*, 20 R. I. 376.

¹ *Jackson v. Schutz*, 18 Johns. 174; *Jackson v. Groat*, 7 Cow. 285.

² *Livingston v. Sticklès*, 8 Paige, 398. *De Peyster v. Michael*, 6 N. Y. 467; *Oberbagh v. Patrie*, *id.* 510. See §§ 261, 285, *ante*, and notes.

³ *Roe v. Sales*, 1 M. & S. 297.

⁴ *Roosevelt v. Hopkins*, 33 N. Y. 81; *Hargrave v. King*, 5 Ired. Eq. 430. So where a lease is jointly to two, and by an arrangement between them each occupies a several portion of the premises, such several use is not a breach of the covenant against underletting. *Boyd v. Fraternity Hall Ass'n*, 16 Bradw. (Ill.) 574. But in *Varley v. Coppard*, L.R. 7 C. P.

in a lodger, although he may have had the exclusive possession of a room for a year or more; for "the covenant can only extend to such underletting as a license might be expected to be applied for, and who ever heard of a license from a landlord to take in a lodger?"¹ [A tenant by placing one in charge of his apartment as servant, or as caretaker to look after it during his absence, against the consent of the landlord, does not as matter of law violate a lease providing that the apartment shall be used as a private dwelling only and shall not be sublet without such consent.²]

§ 406. **Hypothecation of Lease. — Advertising Premises. — Executor bound by the Covenant.** — Depositing a lease as security for money is not a breach of a covenant not to assign;³ even though the covenant be not "to let, set, assign, transfer, or otherwise part with" the premises assigned or the indenture of lease.⁴ [And a mortgage of a lease was held not a breach of this covenant, it being a mere security, and not a transfer of title.⁵] Nor can the mere act of advertising the leased premises for sale be construed into a breach of such covenant.⁶ If a lessee covenant that he, his executors, or administrators, will not assign without license, and dies; the executor will be bound by the covenant, and cannot sell the premises for the payment of debts, without the license of the lessor, and it is the duty of the vendor and not of the purchaser, to procure

505, an express assignment by one partner to another on dissolution of the firm was held a breach of the covenant.

¹ *Doe v. Laming*, Ry. & M. 36. In this case it was also held that such a transfer was also not within the words "otherwise part with" the possession. But in *Greenslade v. Tapscott*, 1 C. M. & R. 405, a verbal license to occupy part of the premises was held to be within the prohibition against "permitting to occupy," and in *West v. Dobb*, L. R. 5 Q. B. 460, an occupancy under a like verbal permission was held a breach of the condition against otherwise parting with the possession. As to what is a lodger, see § 66, *ante*.

² *Presby v. Benjamin*, 169 N. Y. 377.

³ *Doe v. Bevan*, 3 M. & S. 353. So a bond to convey does not constitute an assignment. *Mayhew v. Hardesty*, 8 Md. 479.

⁴ *Doe v. Hogg*, 4 D. & R. 226.

⁵ *Trimm v. Marsh*, 54 N. Y. 599; *Riggs v. Russell*, 66 *id.* 193.

⁶ *Gourlay v. Somerset*, 1 Ves. & B. 73.

the lessor's license for the assignment.¹ [He is bound, also, to show that he has obtained the lessor's consent.² But this is a privilege of the assignee or sublessee only, and if they insist the lessee can avail himself of the prohibition to resist performance.³] And if the lease contains a covenant that the lessee shall not assign without the permission of the lessor, an assignment of part of the premises with such consent is not equivalent to a surrender, but the lessee still remains liable for every act of the assignee which amounts to a breach of the covenant.⁴

§ 407. **Covenant against Particular Assignment.** — If the covenant prohibits an assignment to some particular person, it is understood to intend an immediate assignment; for if the assignment is made to a third person, who subsequently assigns to the prohibited person, this is not a breach of the covenant;⁵ unless the assignment had been made to the third person with the intent, and for the purpose, of his assigning it over.⁶ But if it be covenanted "that in case the lessee should suffer or permit more than one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the lessee lets part of the premises to persons for a year, to cultivate on shares, in the proportion of more than one to each hundred acres, this is a breach of the condition, and defeats the lease.⁷ Sometimes this covenant is qualified by a clause that consent is not to be arbitrarily withheld; and in such case an unfair and unreasonable refusal of permission would leave the lessee at liberty to assign without the lessor's consent.⁸ [But it is held that

¹ *Lloyd v. Crispe*, 5 Taunt. 249; *Roe v. Harrison*, 2 T. R. 425. So *Wollaston v. Hakewell*, 3 Scott, N. R. 593; *Paull v. Simpson*, 9 Q. B. 365; *Austin v. Harris*, 10 Gray 296; *Roberts v. Geis*, 2 Daly, 535, 537.

² *Mason v. Corder*, 7 Taunt. 9.

³ *Blake v. Sanderson*, 1 Gray, 332; *Milkman v. Ordway*, 106 Mass. 232.

⁴ *Jackson v. Brownson*, 7 Johns. 227.

⁵ *Dyer*, 45, a. A covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees. *Doe v. Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, 280.

⁶ Co. Lit. 223, b.

⁷ *Jackson v. Brownell*, 1 Johns. 267; *Same v. Rich*, 7 *id.* 194.

⁸ *Treloar v. Bigge*, L. R. 9, Exch. 151; *Bates v. Donaldson*, 1896, 2 Q. B.

the lessee cannot have an equitable remedy to compel the lessor to consent, since the proviso merely qualifies the lessee's covenant, and does not amount to a contract on the lessor's part.^{1]}

§ 408. **Assignment by Operation of Law not a Breach.** — An assignment, either by the lessee or his executor, which is not voluntary, but effected by operation of law, is not a breach of the covenant not to assign² [as where the assignment is in insolvency,³ or where the lessee assigns to a railway company which has taken the land by right of eminent domain⁴]. So where a lessee gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, this was considered not to be a breach of the covenant.⁵ But such an execution must be *bonâ fide*; for if the tenant shall give a warrant of attorney to a creditor for the purpose of enabling the creditor to take the lease in execution, this would be a fraud and a breach of the covenant; and if the lease be sold under such an arrangement, the lessor may

247. A refusal upon advice, though the grounds of refusal are not specified, does not seem to be arbitrary. *Ibid.* Treloar v. Bigge, *supra*. A lease contained a covenant that the lessee should not assign or sublet without the consent in writing of the lessor; but that such consent should not be unreasonably withheld. The lessee, without applying for the consent of the lessor, sublet to one who intended to use the premises as a turpentine distillery. The premises, having been burnt down by a fire arising from the use of the premises for the business for which they were taken, it was held, that the loss was the natural result of the breach of covenant, and was, therefore, recoverable as damages. Lepla v. Rogers, 1893, 1 Q. B. 31.

¹ Sear v. House, &c., Society, 10 Ch. D. 387.

² Wilkinson v. Wilkinson, Coop. Eq. 250; Weatherall v. Geering, 12 Ves. 513; Dawes, *Ex parte*, 17 Q. B. D. 275; Rigso, *In re*, 1901, 2 K. B. 16; Stevenson v. Silvernail, 15 Johns. 278; Jackson v. Corliss, 7 *id.* 531; Smith v. Putnam, 3 Pick. 221.

³ Bemis v. Wilder, 100 Mass. 446; Farnum v. Heffner, 79 Cal. 575, 92 *id.* 542; Randol v. Scott, 110 *id.* 590; Rand, McNally & Co. v. Francis, 168 Ill. 444.

⁴ Baily v. De Crespigny, 10 B. & S. 1.

⁵ Philpot v. Hoare, 2 Atk. 219; Doe v. Carter, 8 T. R. 57; Doe v. Bevan, 3 M. & S. 358; and see Riggs v. Pinnell, 66 N. Y. 193.

recover the premises from a purchaser at the sheriff's sale.¹ And if the lessee makes a general assignment for the benefit of creditors, by order of court, it will be valid, and his assignees will not be bound by this covenant, but may dispose of the lease as they please.² [But the lease may be forfeited when the assignment is voluntary as such an assignment transfers the interest of the lessee by his voluntary act, and not by operation of law.³] It would seem, also, that the devise of a term by the lessee is not a breach of the covenant not to assign;⁴ although the earlier cases held the contrary.⁵ So if a single woman, to whom a lease has been granted with a condition against alienation, take a husband, it is no breach of the condition; because it is the act of the law which gives the lease to her husband.⁶ But if a lease be made to a husband and wife, upon that condition that, if it come to any other hand than their own, or that of their issue, the lessor shall re-enter, and afterwards the husband die, and the wife takes another husband, the lessor will have a right to re-enter.⁷ And if the covenant is merely personal, having no reference to assigns, as, that the lessee shall not sell without leave, his executors, not being named, may sell without incurring a breach.⁸

§ 409. **But, by Stipulation, may be Ground of Forfeiture.** — The landlord may stipulate that the lease shall not pass by opera-

¹ *Doe v. Carter, supra.*

² *Goring v. Warner*, 2 Eq. Ca. Abr. 100; *Shee v. Hale*, 13 Ves. 404; *Doe v. Bevan, supra*; *Doe v. Powell*, 5 B. & C. 308. But in *Spencer v. Darlington*, 74 Pa. St. 286, it was held that a receiver could not do this.

³ *Medinah Temple Co. v. Currey*, 162 Ill. 441.

⁴ *Crusoe v. Bugby*, 3 Wils. 237; *Doe v. Bevan, supra.*

⁵ *Dyer*, 45, b; *Knight v. Mory*, Cro. El. 60; *Barry v. Stanton, id.* 330; *Dumper v. Syms, id.* 815.

⁶ *Moore*, 21. So where the condition in a lease to a single woman was that the lease was "only for herself," it was held not broken by her marrying a widower with four children, who occupied the premises. *Schroeder v. King*, 38 Conn. 78.

⁷ Com. Dig. (Condition) Q.

⁸ 4 Kent, Com. 130. Executors may dispose of a term for years, as assets, notwithstanding a proviso or covenant that the lessee shall not assign. *Sears v. Hind*, 1 Ves. 295.

tion of law, so that even an involuntary assignment of the lease will work a forfeiture.¹ As where one leased a farm for twenty-one years, if the lessee and his executors should so long continue to occupy it, stipulating that he should not let, assign, or otherwise part with the lease; and the tenant, having become bankrupt, made an assignment, and his assignees sold the lease, it was held that the landlord had a right to enter when the insolvent quit the occupation of the premises.² And wherever the tenant holds his estate under an express condition to keep it in his own possession, with a proviso that it shall cease upon its being taken in execution, the estate will terminate upon the premises being taken under execution, if it puts an end to his occupation.³

§ 410. **Covenant discharged by License from Landlord.**—When a license to assign or underlet has once been given, the condition is thereby discharged, and no forfeiture is incurred by any subsequent alienation; for a proviso, or condition, cannot be divided or apportioned by act of the parties.⁴

¹ *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154; *Doe v. Hawke*, 2 East, 481; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & M. 364.

² *Doe v. Clarke*, 8 East, 185.

³ *Doe v. Hawke*, 2 East, 481.

⁴ See § 286, and notes, *ante*. It is sometimes said that the covenant is discharged; *Jones v. Jones*, 12 Ves. 186; *Doe v. Pritchard*, 5 B. & Ad. 781; but this seems an error. Where there is a mere condition and no covenant, a license discharges all restriction; but if there is a covenant with a proviso of forfeiture superadded, the latter only is discharged. In *Dumpor's Case* there was a bare condition, and no covenant. The two cases *supra* merely attempted to state that case; both were *dicta*, and, in the former case, the covenant was against underletting, not against assigning. The other cases limit the discharge to the condition. Thus, in *Macher v. Foundl. Hosp.*, 1 Ves. & B. 191, *Ld. Eldon* says, "the condition is gone." In *Brummell v. Macpherson*, 14 Ves. 175, there was a bare condition and no covenant. In *Dakin v. Williams*, 17 Wend. 458; and *Gannett v. Albree*, 103 Mass. 374, it is said that the principle of discharge by license does not apply to covenants; and in *Dickey v. McCulloch*, 2 W. & S. 100, it was held that the condition was discharged, but that an action still lay on the covenant. The reason of this will appear on referring to the leading case, which went on the insusceptibility of a condition to be apportioned; while a covenant may always be. If,

Or if the lease be made to three with a condition that neither they nor any of them shall alien without license, and then the lessor licenses one, this discharges the condition as to all.¹ And whether the license be general or given to one person in particular, it does not vary the principle; for the condition being once dispensed with, it is wholly discharged; the provision for making void the lease must exist entire, or not at all, and any subsequent assignee may alien without license.² And if the license extends to but part only of the premises, the lessee may afterwards alien the residue without further license.³ But this general rule of law may be restrained by the stipulation of the parties that permission to assign the lease once given shall not operate so as to authorize any subsequent assignment, but that for each successive assignment express permission shall be necessary; the object of which appears to be to require each new assignee to enter into a fresh covenant with the lessor to pay rent, by which means he gets an additional surety for rent upon every new license given.

§ 411. **Effect of Acceptance of Rent after Breach.**—The acceptance of rent by a landlord, after the breach of a condition not to assign, is tantamount to a license;⁴ but it is held otherwise with regard to a condition not to underlet, for, under such a condition, a subsequent underletting will authorize the landlord to re-enter.⁵ In order to put an end to the condition, the license must be of such a character as is

therefore, there is not a mere condition, but a covenant coupled with a condition, while the lessee and his assignee are relieved of forfeiture, they may still be held liable for breach of the covenant, if made in proper terms to run. *Paul v. Nurse*, 8 B. & C. 486; *Williams v. Earle*, 9 B. & S. 740; *West v. Dobb*, *id.* 755.

¹ *Leeds v. Compton*, 1 Roll. Abr. 472.

² *Brummell v. Macpherson*, 14 Ves. 173.

³ *Leeds v. Compton*, *supra*. A parol license to let part of the premises does not discharge the lessee from the restriction as to the other parts. *Roe v. Harrison*, 2 T. R. 425.

⁴ *Lloyd v. Crispe*, 5 Taunt. 249, 254–257; *Murray v. Murray*, 56 N. Y. 337; *Chipman v. Emeric*, 5 Cal. 49; *Clifford v. Reilly, Jr.* R. 4 C. L. 218; *Butler v. Smith*, 16 Ir. C. L. 213; § 501, *post*.

⁵ *Newman v. Rutter*, 8 Watts, 55; *Bleecker v. Smith*, 13 Wend. 534; *Doe v. Bliss*, 4 Taunt. 735; *Seaver v. Coburn*, 10 Cush. 324.

therein contemplated.¹ Or, if the condition be not a general restraint of alienation, but such as permits the lessee to assign in a particular way, as, for instance, by will, an assignee to whom the lease has been assigned in the way permitted cannot assign it in any other.² It was at one time held that, where there was a right of re-entry upon an assignment or underletting, and a person was found upon the premises acting as tenant, this was *prima facie* evidence of an underletting; and the defendant was bound to show whether the person was a tenant or merely a servant.³ But Lord Ellenborough laid down a rule, which has since been followed, that it is not sufficient to prove an underletting that a stranger was in possession of the demised premises, declaring that they were demised to him by another stranger.⁴ [It is apprehended that now, generally, acquiescence in the possession and receipt of rent from an under-tenant or assignee is a waiver of the breach of the covenant not to underlet or assign.⁵]

§ 412. **Waiver of Breach of Condition.** — As has been stated, a breach of condition producing a forfeiture may be waived, whether the lease was declared to be *ipso facto* void or was voidable only by re-entry⁶ [and such waiver need not be for a consideration⁷]. Not only the receipt of rent, but other acts of waiver, will save the forfeiture.⁸ Thus, where, in an action of ejectment for the breach of a condition that a lessee should not underlet, contained in an agreement of lease, it appeared in evidence that the lessor of the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "Then let it, and I shall

¹ See § 287, *ante*.

² Lloyd v. Crispe, 5 Taunt. 249.

³ Doe v. Rickarby, 5 Esp. 4.

⁴ Doe v. Payne, 1 Stark. 86.

⁵ Smith v. Rector, &c., 107 N. Y. 610.

⁶ See § 288, *ante*; § 492, and notes, *post*.

⁷ Stevens v. Taylor, 58 Iowa, 664.

⁸ Clark v. Jones, 1 Den. 516; O'Keefe v. Kennedy, 3 Cush. 325; Porter v. Merrill, 124 Mass. 534; Roe v. Harrison, 2 T. R. 425; Mulcarry v. Eyres, Cro. Car. 511; Arnsby v. Woodward, 6 B. & C. 519; McKildoe v. Darracott, 13 Gratt. 278.

know what it will produce next year," — it was held that this was a waiver of the forfeiture on a breach of such condition.¹

§ 413. **Landlord and Lessee's Assignee.**—Equity will not relieve against Forfeiture. — When this covenant has been broken by an assignment, the lessor's right of action for a breach is not affected by his accepting an assignment of the lease from an assignee of the lessee.² And the assignee is not liable for a breach of a covenant by the assignor when the lease has been assigned to him by the consent of the lessor.³ It was once thought that the covenant against assignment did not run with the land;⁴ but this notion, which did not distinguish between the covenant and condition, no longer obtains.⁵ Equity will not, in general, relieve against a forfeiture incurred by an alienation without license.⁶ In order that an assignment shall work a forfeiture, the instrument must be valid and effectual in law; accordingly, where there was a proviso in a lease for re-entry in case of an assignment without license, and the lessee by deed assigned all his property, real and personal, to trustees for the benefit of his creditors and was afterwards declared a bankrupt; it was held that the deed of assignment, being an act of bankruptcy and therefore void, did not operate as a valid conveyance of the lessee's interest under the lease, and so did not work a forfeiture.⁷

¹ *Doe v. Watt*, 8 B. & C. 308.

² *Hazlehurst v. Kenrick*, 6 S. & R. 446. But an assignment by the lessee's assignee back to the lessee is not a breach of the covenant, since by the terms of the lease the lessor accepts the lessee as a tenant. *McCormick v. Stowell*, 138 Mass. 431.

³ *Townsend v. Scholey*, 39 Cal. 18. The assignees of a lease are not liable to the lessor for rent accruing to him under a verbal promise from the assignor. *Coit v. Braundsdorf*, 2 Sweeny, 74.

⁴ *Bally v. Wells*, 3 Wils. 33; *Doe v. Smith*, 5 Taunt. 795; and see *Elliot v. Johnson*, 8 B. & S. 38.

⁵ *Weatherall v. Geering*, 12 Ves. 511; *Paul v. Nurse*, 8 B. & C. 486; *Williams v. Earle*, 9 B. & S. 740. A covenant, however, for one and his executors, will not bind his assigns. *Doe v. Smith*, *supra*.

⁶ *Hill v. Barclay*, 18 Ves. 56; *Wafer v. Mocato*, 9 Mod. 112.

⁷ *Doe v. Powell*, 5 B. & C. 308.

SECTION VI.

THE COVENANT TO RESIDE ON THE PREMISES.

§ 414. **How broken. — Runs with the Land.** — The lessee sometimes binds himself and his assigns to reside upon the premises,—that is, to make them his fixed habitation, the place where his political rights are to be exercised, and where he is liable to taxation. This covenant, if not unreasonable, will be enforced, and is held to be broken, not only by the tenant's abandoning the premises, personally, but by his doing any act whereby his residence may become impossible; as, by suffering the premises to be taken and sold under an execution, having first confessed the judgment upon which the execution issued.¹ And a lease made on condition that the tenant shall actually occupy during the term is determined by his assignees taking possession of the premises on his bankruptcy,² although such a covenant will not be broken by the occupancy of an agent of the covenantor.³ [And where the agreement was for the lessee to "occupy only for herself," it was held not to be a breach that the lessee married a widower with children, and lived with them on the premises.⁴] This is a covenant running with the land, and will bind an assignee of the lease, although the executors and administrators only were named.⁵

SECTION VII.

THE COVENANT TO BUILD AFTER A PRESCRIBED PATTERN.

§ 415. **When enforced in Equity. — Remedy at Law for Breach of.** — Although equity will not, in general, decree the specific

¹ *Doe v. Hawke*, 2 East, 481; *Tatem v. Chaplin*, 2 H. Bl. 133.

² *Doe v. Clarke*, 8 East, 185. This is not the case of a forfeiture, but actual occupation was a condition of the lease; and it was considered by Lord Ellenborough, in *Doe v. Carter*, 8 T. R. 57, 300, that such a condition would be good to determine the lease in case of bankruptcy.

³ *Clark v. Clark*, 49 Cal. 586.

⁴ *Schröder v. King*, 38 Conn. 78.

⁵ *Spencer's Case*, 5 Co. 16, a; *Tatem v. Chaplin*, *supra*.

performance of a covenant, but will remit the party to his action of damages for a breach thereof, yet a covenant that the lessee will build a house on the demised premises, to correspond with the adjoining houses already built, as to its elevation or otherwise, may be enforced.¹ But where a landlord has dispensed with a covenant of this description in favor of one tenant, which was entered into for the benefit of all, such as to build in uniformity, or of a certain elevation, although the lessor may claim damages at law, he cannot have relief by injunction to restrain others, to whom he has not given such license, from infringing the covenant; for if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot, with justice, come into equity for an injunction against others; because they are deprived of their right to have the general plan enforced for the benefit of all.² If land is let to a man, on which he agrees to erect certain buildings, within a certain time, with a power of re-entry to the lessor in case he fails to do so, but no lease is to be granted until the buildings are completed; the landlord may re-enter or maintain ejectment if the buildings are not erected within the time limited.³ If a lessee agrees to erect a valuable building upon the premises, and at the expiration of the term to surrender them in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with

¹ *Franklyn v. Tuton*, 5 Mod. 469. And see *Mosely v. Virgin*, 3 Ves. 184. A breach of a covenant to make a roadway in front of a particular house is not to be relieved against, because, if made before the roadway in front of adjacent houses is made, it would be cut up and useless. *Nokes v. Gibbon*, 3 Drew. 681.

² *Roper v. Williams*, Turn. & R. 18.

³ *Oldershaw v. Holt*, 12 Ad. & E. 590; *Doe v. Ekins*, Ry. & M. 29; *Doe v. Birch*, 1 M. & W. 402. But if the lessee agrees to pull down the old house and rebuild a new one, he is not obliged, in the absence of an express stipulation to that effect, to erect the new house in the same manner and in the same style and shape, or with the same elevation as the old building. *Low v. Innes*, 4 De G., J. & S. 286. A covenant that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell v. Baber*, 18 W. R. 1021.

no reservation of a right to remove the building referred to, such building belongs to the lessor at the end of the term.¹ [If no time is specified in the lease for the erection of the building, the tenant may erect it at any time during the term; and his mere declaration that he will not make the improvement, is not a breach of his agreement.²]

SECTION VIII.

THE COVENANT AGAINST CARRYING ON PARTICULAR TRADES.

§ 416. *May be enforced in Equity. — Run with the Land. —* Another covenant not infrequently inserted in a lease, on the part of the lessee, relates to his mode of occupation; as, that he will not carry on particular trades upon the premises, nor assign to persons who carry on such trades; or that he will not carry on any business there which will be offensive to the neighborhood.³ Sometimes the covenant goes further, and prohibits the carrying on of any trade or business whatever. This precaution often becomes necessary, particularly in town leases, not merely for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good-will thereby diminished. Equity will enforce the performance of this covenant, and, by injunction, regulate or restrain the lessee's occupation of the premises, as circumstances may

¹ *Mayor v. Hamilton F. I. Co.*, 10 Bosw. 537; *Mayor v. Brooklyn F. I. Co.*, 41 Barb. 231.

² *Palethorp v. Bergner*, 52 Pa. St. 149. It is held that where a tenant contracts with his landlord to build or to repair buildings, for a compensation to be made him by the landlord, either in money or in the use and occupation of the buildings, the tenant is, in respect of such repairs, the landlord's agent; and so the building will be liable for a lien by the mechanic making such repairs. *Hall v. Parker*, 94 Pa. St. 109; *Wainwright v. Barclay*, 12 Phila. 221; *Barclay v. Wainwright*, 86 Pa. St. 191; *Boteler v. Espen*, 99 *id.* 313; *Long v. McLaughlin*, 103 *id.* 537.

³ An under-tenant may pursue any lawful business on the premises not prohibited by the lease to his lessor or himself, and not injurious to the premises. *Taylor v. Moffat*, 23 Ind. 304.

require.¹ [And where the parties, by their express stipulations, have determined that a particular trade or business, conducted by one, will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which it can be perceived may be highly detrimental to the other, although it is not clear that it produces a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages; it is still competent for a court of equity to restrain further infractions of the covenant.²] Covenants of this kind, as they affect the mode of occupation or enjoyment, run with the land; and the assignee, though not named, will be liable to an action for damages, or to a forfeiture on the condition of re-entry, if he uses the property in contravention of such an agreement.³

¹ *Howard v. Ellis*, 4 Sandf. 369; *Macher v. Foundling Hospital*, 1 Ves. & B. 188; *Godfrey v. Black*, 39 Kan. 193.

² *Steward v. Winters*, 4 Sandf. Ch. 587; *Dodge v. Lambert*, 2 Bosw. 570; *Stees v. Kranz*, 32 Minn. 313. See § 419, *post*.

³ *Mayor v. Pattison*, 10 East, 136; *Brouwer v. Jones*, 23 Barb. 153; *American Strawboard Co. v. Haldeman Co.*, 54 U. S. App. 416; *Hitchcock v. Anthony*, *id.* 439; *Fleetwood v. Hull*, 23 Q. B. D. 35; *Wertheimer v. Circuit Judge*, 83 Mich. 56. A stipulation in a lease of premises on which a certain business has been carried on, that the lessor will not pursue the same occupation in the same neighborhood is a personal obligation of the lessor. *Hebert v. Dupaty*, 42 La. An. 343. It was held that a covenant that lessee should sell no beer upon the premises except that manufactured by a certain brewing company may be enforced by the company for whose benefit the contract was made, although the company was not a party to the lease. *Ferris v. American Brew'g Co.*, 155 Ind. 539. A recital of the purposes for which demised premises are let, for example, describing them as now occupied as a timber-yard, and to be occupied as a timber-yard, constitutes an express covenant to use them for no other purpose, and runs with the land. *Deforest v. Byrne*, 1 Hilt. 43. The lessee of a public-house covenanted that he or his assigns would not do any act which might be a breach of the licensing laws, or be a ground for the withdrawing of the licenses for the sale of liquors therein. The lessee assigned the term to the defendants, who underlet the premises. The under-lessee committed an offence against the licensing laws, the result of which was that the renewal of the licenses was refused. It was held that the term "assigns" in the covenant did not include an under-lessee, and that the defendants were not liable for a breach of the covenant in respect of the offence committed by their under-lessee. *Bryant v. Hancock*, 1898, 1 Q. B. 716.

§ 417. **For Total Restraint of Trade, against Public Policy. — For Limited Restraint, when valid. —** Generally, those contracts which totally restrain trade, as that a man will not pursue his occupation or carry on business anywhere in the State, are contrary to sound policy ; and so void, upon whatever consideration made. For such contracts are injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or why another should contract for the restraint; they are injurious to one party, without being beneficial to the other.¹ But there may be reasons for allowing parties to contract for a limited restraint, and such contracts, if made on a sufficient and reasonable consideration, are valid ; yet, even then, the law presumes them to be bad, until the circumstances inducing the arrangement are shown to be reasonable and useful.² [It is said that inquiries to be made to determine the validity of a contract in restraint of trade are: 1. Whether it is a partial restraint. 2. Is it upon an adequate consideration? 3. Is it reasonable?³ Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself, or the State, of his labor, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labor, skill, or talent; and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive on himself, are not unreasonable, having regard to the subject-matter of the contract.⁴] The limited rule applies in favor of a landlord whose premises may be injured, and his general interests made to suffer, by the carrying on of certain trades and operations upon the premises. For this reason a contract not to exercise a trade or carry on business in a particular place, or with a particular person, will be upheld and

¹ *Ross v. Sadgbeer*, 21 Wend. 166 ; *Saratoga Co. Bk. v. King*, 44 N. Y. 87.

² *Chappel v. Brockway*, 21 Wend. 157 ; *Pierce v. Fuller*, 8 Mass. 223 ; *Nobles v. Bates*, 7 Cow. 307 ; *Horner v. Graves*, 7 Bing. 735 ; *Palmer v. Stebbins*, 3 Pick. 188 ; *Mitchell v. Reynolds*, 1 P. Wms. 181 ; *Archer v. Marsh*, 6 Ad. & E. 959 ; *Pike v. Thomas*, 4 Bibb. 486.

³ *Holbrook v. Waters*, 9 How. Pr. R. 335.

⁴ *Leather Cl. Co. v. Lorsant*, L. R. 9 Eq. 345.

enforced. As, if a lessee covenants that he will not underlet the shop, yard, or other thing belonging to the house, to one who shall sell coals, and will not himself sell coals there, and then lets the whole house to one who sells coals, there is a breach of the covenant.¹ And where a lessee covenanted not to use, exercise, or suffer, or permit another to use, or exercise any trade or business whatever, upon the leased premises, and then assigned his lease to a schoolmaster, who carried on his business on the premises; this was held to be a breach of the covenant.² [A covenant by the lessor of a brewery not, during the continuance of the lease, to carry on the business of a brewer, or merchant or agent, for the sale of ale, in S., or elsewhere, nor to be concerned in said business, was enforced;³ and so a covenant that ardent spirits should not be sold on the premises.⁴ A provision that the leased premises should be used strictly as a private dwelling, and not for any public or objectionable purpose, was held to be violated by their use as a boarding-house, although the lessor had consented to their use for sleeping-rooms in connection with a girls' school.⁵ And where a lease contained a covenant that a house to be built immediately adjoining the house in which the lessor lived should be built fit for a private family, it was held to be a continuing covenant, obliging the lessee as well to keep as to build the house as a private dwelling-house, and was broken by his converting it into a public-house.⁶ A consent by a lessor that a third party may occupy the leased premises for a specified business under the lessee, who is to be responsible for the rent, is a restrictive waiver of conditions not to sublet or carry on any other than the kind of business to which the lessee is restricted by the lease, and applies only to such third person and to his specified business.⁷]

¹ *Chinsley v. Langley*, 1 Roll. Abr. 427, l. 35; *Doe v. Bird*, 2 Ad. & E. 161. And see *Pierce v. Fuller*, *supra*.

² *Doe v. Keeling*, 1 M. & S. 95; *Doe v. Spry*, 1 B. & A. 617

³ *Hinde v. Gray*, 1 M. & G. 195.

⁴ *Hatcher v. Andrews*, 5 Bush, 561.

⁵ *Gannett v. Albree*, 103 Mass. 372.

⁶ *Bray v. Fogarty*, 4 Ir. R. Eq. 544.

⁷ *Wertheimer v. Circuit Judge*, 83 Mich. 56.

§ 418. *Never to be implied.*—A covenant in a lease, in restraint of a beneficial use of the property, will not be implied where none is expressed.¹ Thus a covenant not to use the premises for any other purpose will not be inferred from the words “to be used as cabinet warerooms.”² And where the lessee covenanted that he would not do any act upon the premises which might be to the damage, annoyance, or disturbance of the lessor, or of any of his tenants, or to the neighborhood, and that he would not permit any person to inhabit the premises who should carry on certain specified trades or business (that of a licensed victualler not being one of them), or any other business that might be offensive, or an annoyance or disturbance to any of the lessor’s tenants, — the court held that the opening of a public-house on the premises was not a breach of the covenant, as it did not appear that the public-house was an annoyance to the tenants or likely to become so.³ So a covenant not to carry on the business of a common brewer, or retailer of beer, was held not to be broken by carrying on the business of a retail brewer.⁴ But a covenant not to carry on the trade of a butcher is broken by selling raw meat, although no animals are slaughtered on the premises.⁵ And a covenant to occupy as a jobber of goods is broken by occupying as an auctioneer.⁶

¹ But see, *contra*, *Reed v. Lewis*, 74 Ind. 433. It seems that either party may make a valid contemporaneous parol agreement, in consideration of the lease, not to engage in a rival business. *Welz v. Rhodius*, 87 *id.* 1. Under the Civil Code of Louisiana, § 2710, when a lease is silent as to the use which is to be made of the leased premises, it does not follow that the lessee may make what use of them he pleases; but he is still bound to enjoy the thing “according to the use for which it was intended by the lease.” *Railroad Co. v. Darms*, 39 La. An. 766.

² *Brugman v. Noyes*, 6 Wis. 1. But see, *contra*, *Deforest v. Byrne*, 1 Hilt. 43.

³ *Jones v. Thorne*, 1 B. & C. 715.

⁴ *Simons v. Farren*, 1 Bing. N. C. 126. So an agreement not to carry on trade in his own name, or in that of any other person in a particular town. Managing the business of another person in the same trade at a weekly salary is not a breach. *Allen v. Taylor*, 24 L. T. N. S. 249.

⁵ *Doe v. Spry*, 1 B. & A. 617. In construing a covenant not to carry on an offensive business, much will depend on the situation of the prem-

⁶ *Steward v. Winters*, 4 Sandf. Ch. 587.

§ 419. **Different Covenants construed. — Equitable Remedies. —**

If a tenant covenants not to carry on a particular trade without the written consent of the lessor, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on the other, without a written license. Where the engagement is not to trade within a given distance in a town, such distance is to be measured by the shortest way of access by the ordinary foot-path. Thus, where the assignee of the lease of a public-house covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned, it was held that the half-mile imported half a mile measured, not in a direct line, but by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignee.¹ If a lessee exercises a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, since some positive act of waiver is necessary to be effectual; but if he permit the tenant to expend money in improvements, which are necessary to adapt them to that trade, it would seem to be evidence of his consent to their being so occupied.² [It is not a defence to

ises, and their relation to other buildings. *Gutteridge v. Munyard*, 7 C. & P. 129; *Seymour v. McDonald*, 4 Sandf. Ch. 502. Using a house as a private lunatic asylum was held not to be, *per se*, a breach. *Doe v. Bird*, 2 Ad. & E. 161.

¹ *Leigh v. Hind*, 9 B. & C. 774. The converse of this proposition seems to be held in *Moufflet v. Cole*, 42 L. T. Exch. 8. In a lease of a coal mine, the lessee stipulated to pay rent for coal taken out, and to mine a certain number of tons annually; and it was held that settlements for coal taken out were not a discharge of a breach in not taking out the stipulated quantity. *Powell v. Burroughs*, 54 Pa. St. 329. See § 17 *a*, *ante*.

² *Doe v. Allen*, 3 Taunt. 71. Premises occupied as a manufactory of carpet-bags were leased to be occupied "for the same purpose they now are." The tenant used them as a manufactory of caps, and it was held not so material a breach to determine the lease. *Shumway v. Collins*, 6 Gray, 227. A covenant to use the premises only for a regular dry-goods jobbing business is violated by selling at auction. *Steward v. Winters*, 4 Sandf. Ch. 587. The payment of money is not necessary to constitute a "business" under a covenant not to carry on any trade or business. *Rolls v. Miller*, 27 Ch. D. 71. So a "Home for Working Girls" main-

proceedings to restrain the lessees from using the premises in a way which they covenanted not to do, that the use is not a public or a private nuisance; nor that it will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant.¹ In numerous cases, recovery at law or relief in equity has been granted where the grantor has conveyed to different individuals adjoining lots, and the deeds contained a covenant or agreement restricting the use of the property to a dwelling-house, or prohibiting any trade or business which might be offensive to the neighboring inhabitants. In all such cases equity has held that such covenant was for the mutual benefit and protection of all the purchasers; and although a previous purchaser from the original proprietor could not sue thereon at law, yet that equity might protect him, by injunction, against the carrying on of any noxious business or trade upon the lot of such subsequent purchaser.² An injunction will not be granted to restrain a breach of covenant not to carry on a certain business, under penalty of liquidated damages, although the defendant was insolvent; for the plaintiff has a legal remedy.³]

tained on the premises was held to be a business. *Ibid.* So a hospital. *Portman v. Home Hospital Ass'n*, *id.* 81, n. In a lease at a rental payable monthly, the lessees covenanted not to engage in a certain business on the premises, "under a penalty, to be paid in the nature of rent, in addition to the amount above mentioned, in equal monthly instalments at times of payment of the rent aforesaid." It was held that this was a personal covenant, and that the engagement to pay the penalty was to pay, not for the use of the premises, but for the violation of the covenant. *Latimer v. Groetzinger*, 139 Pa. 207.

¹ *Dodge v. Lambert*, 2 Bosw. 570; *Howard v. Ellis*, 4 Sandf. 369; and see § 416, *ante*.

² *Barrow v. Richard*, 8 Paige, 351; *Parker v. Nightingale*, 6 Allen, 341; *Dorr v. Hanrahan*, 101 Mass. 581.

³ *Vincent v. King*, 13 How. Pr. R. 234.

SECTION IX.

THE COVENANT FOR PARTICULAR MODES OF CULTIVATION.

§ 420. **Different Forms of. — Implied from Custom.** — In farming leases, there are usually covenants as to the manner in which the farm is to be managed, the course of cropping, the expenditure upon the farm of the manure made upon it, and the like. These differ in different sections of the country, according to the course of husbandry adopted. Sometimes they are intended to enforce the custom of the country, in reference to what may be considered good husbandry; at other times, to vary from it; and, in this latter case, the covenant will exclude and supersede the custom. And where a tenant held the premises under the terms of an expired lease, by which it was stipulated that the tenant, on quitting the farm, should not sell or take away any of the manure in the fold, but leave it to be expended by the landlord or his succeeding tenant, and the lease contained no stipulation as to the tenant being entitled to payment for such manure, but by the custom of the country, although the tenant would have been bound to leave the manure in like manner, yet he would be entitled to payment for it; it was held that, as an express stipulation had been made upon the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure.¹ But as far as the custom is not inconsistent with the stipulations of the lease, it is deemed to be impliedly grafted upon it, and to be part of the contract.²

§ 421. **To manage Farm in a Husbandlike Manner, implied.** — Independently of express covenants for proper cultivation on the part of a tenant, it is held that the mere relation of landlord and tenant is a sufficient consideration to raise an implied promise by the tenant to manage the farm in a husbandlike manner, and in conformity to the custom of the neighborhood.³

¹ *Roberts v. Barker*, 1 Cr. & M. 808.

² *Hutton v. Warren*, 1 M. & W. 466; *Hindle v. Pollett*, 6 *id.* 529.

³ *Powley v. Walker*, 5 T. R. 373; *Horsefall v. Mather*, Holt, 7; *Buck v. Pike*, 27 Vt. 529. There being no express covenants as to husbandry, a

And even where a tenant occupies under an agreement which does not amount to a lease, he is liable, upon the same principle, to an action for mismanaging the farm.¹ But this obligation extends only to a reasonable and usual mode of culture, and does not bind the tenant to any extraordinary course of cultivation.²

§ 422. *When Equity will enforce.* — Generally, the common covenants in husbandry are not, from their nature, the subject of an equitable jurisdiction, for which a specific performance can be decreed.³ Nor will the court investigate the proper mode of cultivating a farm; and the implied terms of an agricultural contract are not more specific than a general covenant to keep in repair.⁴ But an injunction was granted to restrain a tenant from year to year, who, it was said, was equally bound as a tenant for a longer period to manage his farm in a husbandlike manner, from removing crops, and manure, except according to the custom of the country.⁵ Where a tenant was enjoined from ploughing up pasture land, the lease contained no express covenant against converting pasture into arable land; but the landlord was, nevertheless, held to be entitled to an injunction, there being an implied covenant to manage pasture in a husbandlike manner.⁶ So

re-entry clause does not apply to the implied covenants. *Hough v. Brown*, 104 Mich. 109; *Somers v. Loose*, 127 Mich. 77. But where the lease was on shares and the tenant cultivated negligently, it was held that the landlord was entitled to such portion of the crop as his share would have amounted to had the tenant used proper diligence. *Wheat v. Watson*, 57 Ala. 581.

¹ *Tempest v. Rawling*, 13 East, 18. See § 344, *ante*.

² *Lekh v. Hewitt*, 4 East, 154; *Webb v. Plummer*, 2 B. & A. 748. He cannot set up a claim for voluntarily farming land in a more beneficial manner than the lease required. *Bullitt v. Musgrave*, 3 Gill, 31. So, when the land is rented for a portion of the crop. *Patton v. Garrett*, 37 Ark. 605.

³ *Rayner v. Stone*, 2 Eden, 128.

⁴ *Dunn v. Bryan*, 7 Ir. R. Eq. 143.

⁵ *Onslow v. —*, 16 Ves. 173.

⁶ *Drury v. Molins*, 6 Ves. 328. A lease contained covenants by the lessee to pay a specified increased rent for each acre which he should plough up, over and above a third part of the demised premises; and

equity has interfered to restrain a tenant from sowing mustard, saffron, or other deleterious crops, contrary to the usual course of husbandry.¹

§ 423. **Legal and Equitable Remedies on.** — If a tenant covenants to leave stock of a certain amount upon the premises, and a fair suspicion should arise that he does not mean to perform his covenant in that respect; although compensation in damages might be had for a breach, after the expiration of the term, yet as the agreement has relation to the mode of enjoyment for which the landlord has stipulated, a bill in the nature of a *quia timet* may be filed.² And where a man was let into possession of a farm and paid rent, under an agreement for a future lease for fourteen years, which was to contain a covenant (amongst others) against taking successive crops of corn from the land, and a proviso for re-entry upon the breach of any of the covenants, but the lease was not in fact executed; the tenant having taken successive crops of corn from the farm, which would be a breach of the covenant if the lease had been executed, the lessor brought ejectment, and was allowed to recover.³ For, until the lease was executed, the tenant, it was said, held as a yearly tenant, subject to the terms and conditions which, by the agreement, were to be embodied in the lease; and being guilty of a breach of one of them, the landlord had a right to re-enter.⁴

that in case he should plough up one third or any other part, he should lay down the same with clover or grass. He ploughed up more than one third, paid the increased rent for it, and then laid it down in pasture. Held, that, upon the construction of the covenants taken together, the increased rent ceased to accrue from the time the ploughed land had been restored to pasture. *Domvile v. Forde*, 7 Ir. R. L. 534.

¹ *Pratt v. Brett*, 2 Mod. 62.

² *Ward v. Buckingham*, 3 Bro. P. C. 581; *Briggs v. Oaks*, 26 Vt. 138; *Smith v. Niles*, 20 *id.* 315.

³ But it is held that although performance of a tenant's covenant to keep down the briers, &c., in the fence-corners is not to be postponed until the end of the term, a breach will not enable the landlord to end the tenancy by a notice to quit. *Ricketts v. Richardson*, 85 Ind. 508.

⁴ *Doe v. Amey*, 12 Ad. & E. 476. A lessee for years covenanted not to carry off hay from a farm, and a quantity of hay was attached by his

SECTION X.

THE COVENANT TO REDELIVER CHATTELS OR FIXTURES.

§ 424. **Affords Remedy for Injury or Removal of.** — When chattels or fixtures, which are not part of the freehold, are leased with a house, it is usual to insert a covenant on the part of the lessee to redeliver them in good condition at the end of the term. The purpose of this is to give the lessor a remedy at the end of the term, as well for the non-delivery of the things themselves as for damage sustained by their being injured ; for, as he cannot complain of an injury during the existence of the term, since they may be replaced before the end of it, and as the ordinary remedy by trover or replevin merely affects the recovery of the chattels, he might be without remedy for damage done to them, without the insertion of such a covenant. The covenant sometimes includes an agreement to surrender all improvements placed by the lessee upon the premises during his term ; and will then embrace every addition, alteration, erection or annexation made by the lessee during the term, to render the premises more available or profitable. But as to chattels annexed to the premises, not fixtures, a tenant may be excused for non-performance by showing that in fact they belonged to another, although found by him on the premises, and that they were taken from his possession by virtue of a chattel mortgage executed by the owner.¹ [Where suit was brought

creditors and carried off by his consent; held, to be no breach of his covenant. *Smith v. Putnam*, 3 Pick. 221. But the lessor may, under such circumstances, have an action against the attaching creditor of the tenant, or one who purchases with notice of the landlord's right. *Leland v. Sprague*, 28 Vt. 746; *Baxter v. Bush*, 29 *id.* 465.

¹ *Lawrence v. Kemp*, 1 Duer, 363; *Higgins v. Whitney*, 24 Wend. 379; *Perry v. Chandler*, 2 Cush. 237; *Kaley v. Shed*, 10 Met. 317; *French v. Mayor*, 16 How. Pr. R. 220. On a lease of land for a term of years, with a covenant by the lessee that if the lessor should choose during the term to take all or any part of the land for building thereon, she might enter upon all or any part, to erect such buildings as she should think proper, and to do all necessary acts without interruption by the lessee, on giving

on the covenant to redeliver premises, for damages occasioned by the removal by the tenant of fixtures annexed to the freehold, it was held that the tenant was not aggrieved by a ruling that the measure of damages was the sum required to restore the fixtures, allowing for reasonable use and wear, and for the increase of value by substituting new material for old.^{1]}

SECTION XI.

THE COVENANT TO SECURE PAYMENT OF RENT AND THE PERFORMANCE OF AGREEMENTS.

§ 424 *a*. **Different Forms of. — Landlord's Lien. — Statutory Liens.** — A tenant is sometimes required to give security for the payment of rent, and the performance of covenants embraced in the lease. The security may consist of a mortgage upon his goods and chattels, and may be contained either in the lease, or in a separate instrument,² or in the undertaking of a third person, conditioned to pay the rent of the premises in case of the tenant's failure to do so. Sometimes this is in the form of a stipulation that lessor shall have a lien for his rent on all personal property then on premises, such lien to be enforced in case of non-payment in the same manner as in cases of a chattel mortgage.³ The undertaking may

six months' notice of her intention; it was held, that the lessor might give the six months' notice of her intention to take the whole of the land, and, at the expiration of that time, bring ejectment. *Doe v. Abel*, 2 M. & S. 541.

¹ *Watriss v. Bank of Cambridge*, 130 Mass. 343. As to what will be considered fixtures, as between landlord and tenant, see §§ 544–549, *post*.

² *Brooker v. Jones*, 55 Ala. 266.

³ *Van Heusen v. Radcliff*, 17 N. Y. 580; *McLean v. Klein*, 3 Dil. 113. So where a farm and stock were leased with proviso that the stock and products of the farm were to be the property of the lessor until the lessee's obligations were fulfilled. *Griswold v. Cook*, 46 Conn. 198. Where the stipulation was for a lien upon the lessee's furniture, it was held that the landlord stood in the relation of pledgee rather than mortgagee; and so, while entitled to the possession of the furniture, was liable to account for the using of it. *State v. Adams*, 76 Mo. 605.

be extended, so that the surety will become answerable for any damages which the landlord may sustain by the tenant's neglect to perform his covenants. The rules applicable to suretyship in general will apply to such an undertaking; as, that it must be in writing and upon a good consideration.¹ It must be reasonably certain in its terms, and therefore a provision in a lease which stipulated that the lessor should have a lien by way of mortgage upon all goods or other personal property which might be put upon the demised property, was held void for uncertainty, since it did not identify any particular property, nor could it be known to what the lien really applied.² But where by the terms of the lease it is provided that the landlord shall have a lien on the goods or stock on the premises belonging to the tenant [it has been held that] the right hereby created enures by way of reservation, and is superior to that of the general creditors.³ [A clause in a lease of real estate, reserving to the lessor a lien for the rent on the goods, chattels or crops of the lessee placed or raised on the demised premises, to be enforced on non-payment of the rent as in case of a chattel mortgage, by taking possession and sale of the property, is in

¹ In England and certain of the United States the consideration must be expressed in the instrument of guaranty. *Wain v. Warlters*, 5 East, 10; *Sears v. Brink*, 3 Johns. 210; *Newcomb v. Clark*, 1 Den. 226. But though the agreement of the surety be dated after the lease, if it is expressed to be in consideration of the letting, it will, of itself, be regarded as a contemporaneous promise subsequently reduced to writing. *Gottberger v. Radway*, 2 Hilt. 342. If a surety signs the agreement of the principal, the expression of the consideration contained therein is sufficient. *Clark v. Rawson*, 2 Den. 135. The words "for value received" is a sufficient expression of the consideration. *Watson v. McClure*, 19 Wend. 587.

² *Buskirk v. Cleaveland*, 41 Barb. 610. Where a lease contains a "chattel mortgage clause" as security for performance of covenants, the election of the lessor to terminate the lease for breach of covenants does not discharge the mortgage lien. *Ludlum v. Rothschild*, 41 Minn. 218.

³ *Metcalf v. Fosdick*, 23 Ohio St. 114; *McCaffrey v. Woodin*, 65 N. Y. 459. And even where described as "lien or mortgage," it is held to be a lien only. *Dalton v. Landahn*, 27 Mich. 529; *Metcalf v. Fosdick*, *supra*; but see *Hale v. Omaha Bk.*, 41 N. Y. S. C. 207; *Reynolds v. Ellis*, 103 N. Y. 115, *contra*.

its nature and effect a chattel mortgage, and comes under the provisions of a statute requiring chattel mortgages to be filed or recorded.¹ It is held that a chattel mortgage on crops to be thereafter sown and raised on the land of the mortgagor does not constitute a lien on the land, and will attach only to such interest as the mortgagor has in the crops when they come into being.²] The undertaking of a surety who signs upon the face of the agreement with his principal, although he adds the word "surety" to his name, is an original and not a collateral undertaking.³ If several persons become bound in a lease for the payment of rent, the lease is, in contemplation of law, to them all, if there is nothing in the body of the instrument to negative that conclusion.⁴ And where sureties upon a lease have bought the leasehold premises on a sale, to indemnify themselves for payments of rent, they become assignees of the lease and liable as such to the lessor.⁵ But where one guarantees the payment of rent by an indorsement on the lease, his undertaking is distinct from that of the lessee, and they cannot at common law properly be joined in one action.⁶ [In many

¹ *Merrill v. Ressler*, 37 Minn. 82; *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400; *Reynolds v. Ellis*, 34 Hun, 47; *Thomas v. Bacon*, *id.* 88; *Wisner v. Ocumpaugh*, 71 N. Y. 113. See *Fox v. McKinney*, 9 Or. 495, where the crop was merely to be stored as security for the rent in money.

² *Simmons v. Anderson*, 44 Minn. 487; *Christianson v. Nelson*, 76 *id.* 36. A secret oral agreement for a lien, or a provision in a lease that the lessee shall not dispose of any produce grown on the premises until payment has been made of the rent and taxes and the cows have been wintered, does not create a lien on the produce. *McLellan v. Whitney*, 65 Vt. 510; *Beers v. Field*, 69 *id.* 533; *Stockton Savings Loan Society v. Purvis*, 112 Cal. 236. It is held that where a statutory lien in favor of the landlord exists, as against the tenants' chattels, the landlord's right to have the proceeds of the sale of such chattels is superior to the lien of a chattel mortgage given before the beginning of the tenancy and before the goods were moved upon the demised premises. *Ford v. Clewell*, 9 Houst. (Del.) 179.

³ *Perkins v. Goodman*, 21 Barb. 218; *Hunt v. Adams*, 5 Mass. 358.

⁴ *Magee v. Fisher*, 8 Ala. 320.

⁵ *Buland's Appeal*, 66 Pa. St. 470.

⁶ *Virden v. Ellsworth*, 15 Ind. 144.

of the States, the statutes create a lien for rent, or, in some States for rent, and supplies furnished, in behalf of the landlord, as against the goods, chattels, or crops of the tenant. This differs widely as to its extent and duration and other particulars in different States, and an examination in detail of the different statutes on the subject is not within the purpose of this work.¹]

¹ Following, is a reference to statutes or parts of statutes in different States creating a landlord's lien, with citations of the principal cases in which these have been the subject of judicial interpretation: *Illinois*: Thompson v. Mead, 67 Ill. 395; Hunter v. Whitfield, 89 id. 229; Wetzel v. Mayers, 91 id. 497; Webster v. Nichols, 104 id. 160; R. S., 1874, p. 661, §31; *Pennsylvania*: Longstreth v. Pennock, 20 Wall. 575; Edwards's Appeal, 105 Pa. St. 103; *Louisiana*: Marshall v. Knox, 16 Wall. 597; Vilavasso v. Creditors, 48 La. Ann. 946; O'Kelly v. Ferguson, 49 id. 1230; C. C., arts. 2217 et seq.; *District of Columbia*: Fowen v. Rapley, 15 id. 328; Saloy v. Block, 136 U. S. 338; *New Jersey*: Van Horn v. Göken, 12 Vroom, 499; *North Carolina*: Code, §§ 1754 et seq.; Durham v. Speke, 82 N. C. 87; Belcher v. Grimsley, 88 id. 88; Montague v. Miel, 89 id. 137; State v. Merritt, id. 506; State v. Rose, 90 id. 712; Moore v. Faison, 97 id. 322; Kesler v. Cornelison, 98 id. 383; State v. King, id. 650; Brewer v. Chappell, 101 id. 231; State v. Ewing, 108 id. 755; Taylor v. Taylor, 112 id. 27; Jarrell v. Daniel, 114 id. 212; McGehee v. Breedlove, 122 id. 277; Fleming v. Davenport, 116 id. 153; State v. Austin, 123 id. 749; Perry v. Perry, 127 id. 23; *South Carolina*: Kennedy v. Reames, 15 S. C. 548; Carter v. Du Pre, 18 id. 179; Sease v. Dobson, 33 id. 234; *Georgia*: Saulsbury v. McKellar, 59 Ga. 301; Scott v. Pound, 61 id. 579; Alston v. Wilson, 64 id. 482; McCray v. Samuel, 65 id. 739; Stokes v. Gillis, 81 id. 191; *Florida*: Blanchard v. Raines, 20 Fla. 467; Jones v. Fox, 23 id. 454; Fox v. Jones, 26 id. 276; Hodges v. Cooksey, 33 id. 715; St. 1879, c. 3131; *Mississippi*: Laws 1873, p. 79, 1876, p. 113; Code 1880, § 1301, Acts, 1884, p. 80; Phillips v. Douglas, 53 Miss. 175; Taylor v. Nelson, 54 id. 524; Cooper v. Baker, id. 637; Dogan v. Bloodworth, 56 id. 419; Wooten v. Gwin, id. 423; Love v. Law, 57 id. 596; Dunn v. Kelly, id. 825; Fitzgerald v. Fowlkes, 60 id. 270; Cohn v. Smith, 64 id. 816; Lumbley v. Gilruth, 65 id. 23; Richardson v. McLaurin, 69 id. 70; *Alabama*: Code, 1886, §§ 3056-3058, 3467-3478; Folmar v. Brantley, 57 Ala. 588; Collins v. Whigham, 58 id. 438; Starens v. Allen, id. 316; Abraham v. Hall, 59 id. 386; Masterson v. Bentley, 60 id. 520; Ellis v. Martin, id. 394; Smith v. Bryant, id. 235; Lavender v. Hall, id. 214; Westmoreland v. Foster, id. 448; Lomax v. Leonard, id. 537; Evans v. English, 61 id. 416; Steiner v. McCall, id. 413; Boggs v. Price, 64 id. 514; Shields v. Purnell, id. 504; Schaife v. Stovall, 67 id. 237; Corbitt v. Reynolds, 68 id. 378; Wilson v. Stewart, 69 id. 302; Tuttle v. Walker,

§ 424 *b*. **Obligations of Tenant's Surety.** — The obligation of a surety is to be construed strictly, and cannot be extended

id. 172; *Wilkinson v. Kettler*, *id.* 435; *Kennan v. Wright*, *id.* 434; *Agee v. Mayer*, 71 *id.* 88; *Robinson v. Lehman*, 72 *id.* 401; *Jackson v. Bain*, 74 *id.* 328; *Coleman v. Siler*, *id.* 435; *Lake v. Gaines*, 75 *id.* 143; *Bell v. Hurst*, *id.* 44; *Drakford v. Turk*, *id.* 339; *Warren v. Barrett*, 83 *id.* 208; *Horton v. Miller*, 84 *id.* 357; *Powell v. State*, *id.* 444; *Barnes*, *Ex parte*, *id.* 540; *Union W. & E. Co. v. McIntyre*, *id.* 78; *Manasses v. Dent*, 89 *id.* 565; *Clanton v. Eaton*, 92 *id.* 612; *Seisel v. Folmar*, 103 *id.* 491; *Texas*: *Rosenberg v. Shaper*, 51 *Tex.* 134; *Bouchier v. Edmondson*, 58 *id.* 675; *Association v. Cochran*, 60 *id.* 620; *Templeman v. Gresham*, 61 *id.* 50; *Meyer v. Oliver*, *id.* 584; *Marsalis v. Pitman*, 68 *id.* 624; *Chapman v. McLemore*, *id.* 654; *Davis v. Goldberg*, 75 *id.* 48; *Brown v. Collins*, 77 *id.* 159; *Forrest v. Durnell*, 86 *id.* 647; *Champion v. Shumate*, 90 *id.* 597; *McKee v. Sims*, 92 *id.* 61; *R. S.*, arts. 3240–3243; *Arkansas*: *Pluckett v. Reed*, 31 *Ark.* 131; *Tignor v. Bradley*, 32 *id.* 781; *Lambeth v. Ponder*, 33 *id.* 707; *Watson v. Johnson*, *id.* 737; *Lemay v. Same*, 35 *id.* 225; *Reavis v. Barnes*, 36 *id.* 575; *Meyer v. Bloom*, 37 *id.* 43; *Brown v. McGehee*, 38 *id.* 329; *Hammond v. Harper*, 39 *id.* 248; *Varner v. Rice*, *id.* 344; *Merchants' & Planters' Bank v. Meyer*, 56 *id.* 499; *Mills v. Pryor*, 65 *id.* 214; *Hunter v. Matthews*, 67 *id.* 362; *Cocke v. Clauson*, *id.* 455; *Kansas*: *Neifort v. Ames*, 26 *Kan.* 516; *Tarpy v. Persing*, 27 *id.* 745; *Conwell v. Kuykendall*, 29 *id.* 707; *Code*, § 235; *Comp. Laws*, 1885, § 27; *Knowles v. Sell*, 41 *Kan.* 171; *Nessley v. Taylor*, 63 *id.* 674; *Missouri*: *Wag. St.* p. 880, § 18; *Rev. Sts.*, 1889, §§ 6376–6397; *Hubbard v. Moss*, 65 *Mo.* 647; *Crawford v. Coil*, 69 *id.* 588; *Hulett v. Stockwell*, 27 *Mo.* App. 132; *Attaway v. Hoskinson*, 37 *id.* 132; *Haseltine v. Ausherman*, 29 *id.* 451; *Riley v. Rennick Milling Co.*, 44 *id.* 519; *Dawson v. Coffey*, 48 *id.* 109; *Duke v. Compton*, 49 *id.* 304; *Garst v. Good*, 50 *id.* 149; *Beck v. Wisely*, 52 *id.* 242; *Buck v. Tobacco Co.*, 62 *id.* 175; *Williams v. Braden*, 63 *id.* 573; *Phillips v. Burrows*, 64 *id.* 351; *Fulkerson v. Lynn*, 64 *id.* 649; *White v. McAllister Co.*, 67 *id.* 314; *Dunlap v. Dunseth*, 81 *id.* 17; *Lane v. Pollard*, 88 *id.* 326; *Kentucky*: *Gen. Sts.* c. 66, arts. 12, 13; *English v. Duncan*, 14 *Bush*, 377; *Stone v. Bohm*, 79 *Ky.* 141; *Iowa*: on all property subject to execution; *Code*, §§ 2017, 2018; *Rotzler v. Rotzler*, 46 *Iowa*, 189; *Pitkin v. Fletcher*, 47 *id.* 58; *Martin v. Stearns*, 52 *id.* 345; *Van Patten v. Leonard*, 55 *id.* 520; *Gilbert v. Greenbaum*, 56 *id.* 211; *Rollins v. Proctor*, *id.* 326; *Thorpe v. Fowler*, 57 *id.* 541; *Richardsen v. Petersen*, 58 *id.* 724; *Holden v. Cox*, 60 *id.* 449; *Luce v. Moorehead*, 73 *id.* 498; *Thew v. Miller*, *id.* 742; *Bolton v. Lambert Co.*, 72 *id.* 483; *Schurz v. McMenamy*, 82 *id.* 432; *Wright v. Dickey Co.*, 83 *id.* 464; *Carson v. Electric Light & Power Co.*, 85 *id.* 44; *Thompson v. Anderson*, 86 *id.* 703; *Mingus v. Daugherty*, 87 *id.* 56; *Bergman v. Guthrie*, 89 *id.* 290; *Evans v. Collins*, 94 *id.* 432; *Crill v. Jeffrey*, 95 *id.* 634; *Farwell v. Stick*, 96 *id.* 87; *Froser v. Hammer*, 97 *id.* 48; *Wood v.*

beyond its plain terms, by operation of law, without his consent; and therefore where a lease was made for one year, with the privilege to the tenant to retain the premises at the same rent as long as he might wish to do so, the surety was held not to be bound beyond the year without a new agreement entered into by him.¹ [Where the lease contained a privilege of renewal for a further term, and the guaranty was providing "the lessee shall live to the end of the term," and the lessee renewed; it was held that the guaranty did not extend to the additional term.² But where the lease was for a year at a rent payable in monthly instalments during the

Duval, 100 *id.* 724; *Ladner v. Balsey*, 103 *id.* 674; *Hays v. Berry*, 104 *id.* 455; *Ward v. Walker*, 111 *id.* 611; *Indiana*: R. S., 1881, § 5224; *Kenard v. Harvey*, 80 Ind. 37; *Tennessee*: Act, 1875, c. 116; Code, § 3543; §§ 4282, 4283 (M. & V.); §§ 3541, 3542 (T. & S.); Acts, 1879, c. 72; Acts, 1897, c. 114; *Lewis v. Mahone*, 9 Baxt. 374; *Richardson v. Blake-more*, 11 Lea, 290; *Davis v. Wilson*, 86 Tenn. 519; *State v. Hoskins*, 106 *id.* 430; *Minnesota*: Lien Law, 1889, § 5; *Congdon v. Cook*, 55 Minn. 1; *Maryland*: Code, art. 53, § 18; *Gaither v. Stockbridge*, 67 Md. 222; *Utah*: Act March 8, 1894 (Sess. Laws, p. 123); *Stone's Estate*, 14 Utah, 205. *Virginia*: See *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231.

¹ *Brewer v. Thorp*, 35 Ala. 9; *Dodge v. Burdell*, 13 Conn. 170. And see *Union Bank v. Ridgely*, 1 Harr. & G. 324. But *Coe v. Vogdes*, 71 Pa. St. 383, is *contra*. In *Pleasanton's Appeal*, 75 Pa. 344, however, where a surety upon like lease gave notice that he would not be further held, the court decided that he was released. It is held that a deposit for the security of rent alone and to be returned upon the "fulfilment" of the lease, can be retained by the lessor, after re-entry by summary proceedings for default in payment of rent, only to the extent necessary to satisfy rent coming due before the precept was issued. *Michaels v. Fishel*, 169 N. Y. 381. Where a lease gives a tenant a right to make alterations, but provides that the building shall be restored to its original condition by the tenant at the expiration of the term, if required by the lessor, and security is deposited for the performance of this provision, the tenant is bound to restore the building to its original condition before he can demand the return of the security; and it is immaterial, in the absence of any further provision in the lease as to notice, that the landlord did not give notice until after the lease had expired of his desire to have the restoration made; if such notice was given within a reasonable time thereafter, *Reed v. Harrison*, 196 Pa. 337. Where a tenant has covenanted to pay taxes, the mere extension of the time for payment does not release the tenant's surety. *Haynes v. Synnott*, 160 Pa. 180.

² *Woods v. Doherty*, 153 Mass. 558.

term "and for such further time as the lessee may hold the same," and the guaranty was for "the payments of rent as stipulated in the lease," it was held that the guarantor was liable for payments due after the expiration of the year, the tenant holding over.^{1]} So if a lease is made to two persons, one as principal, and the other as surety, and the principal alone occupies, and then holds over; there is no novation of the contract so as to render the surety liable for rent accruing after the expiration of the term.² And any material alteration in the relation of the original parties, without the consent of the surety, will operate as a discharge of his liability; as, if a lessor enlarges the time of performance, or makes a new lease of the premises, either to the lessee or to another person.³ But a surrender of the term and acceptance thereof does not discharge a tenant, or his surety, from the payment of rent already due and payable.⁴ A surety is not ordinarily discharged by reason of the negligence or failure of the lessor to enforce payment of the rent; nor is the lessor under an obligation to notify the surety that the lessee has abandoned the premises.⁵ Nor does a breach of the landlord's covenant to repair, since it does not excuse the tenant's neglect to pay rent, discharge the surety⁶ [nor the fact of the destruction of the premises, except so far as the lease may provide that this shall relieve the tenant from the covenants in it^{7]}. Where a tenant was induced to accept a lease by a fraudulent representation of the landlord as to the fitness of the premises for occupation, but continued to occupy and pay rent for nine months, neither he nor his surety were permitted to set up the objection of fraud.⁸ Nor is he discharged by the landlord's receiving a note of trust or order upon a third person

¹ *Rice v. Loomis*, 139 Mass. 302.

² *Brewer v. Knapp*, 1 Pick. 832.

³ *White v. Walker*, 81 Ill. 422; *Miller v. Stewart*, 9 Wheat. 680; *Rathbone v. Warren*, 10 Johns. 587.

⁴ *McKenzie v. Farrell*, 4 Bosw. 192.

⁵ *Elmore v. Robinson*, 18 La. Ann. 651; *Ledoux v. Jones*, 20 *id.* 539; and see *Craig v. Parker*, 40 N. Y. 181.

⁶ *Coe v. Vogdes*, 71 Pa. St. 388; *Ellis v. McCormick*, 1 Hilt. 313.

⁷ *Kingsbury v. Westfall*, 61 N. Y. 356.

⁸ *Rosenbaum v. Gunter*, 8 E. D. Smith, 208.

for the rent, or by any other device short of absolute payment, unless by a mutual agreement;¹ nor by an agreement that the tenant shall occupy a different part of the premises from that originally demised;² nor by an agreement to put in a new tenant when the original tenant is unable to pay rent;³ nor by the acceptance of the rent monthly, instead of quarterly, as reserved by the lease; nor for the reason that the tenant was excluded from the use of certain privileges to which the lease entitled him.⁴ A mere neglect to sue the principal at the request of the surety will not discharge the surety, unless the principal were then solvent, and subsequently becomes insolvent.⁵ And a surety has no right to call upon the landlord to distrain the tenant's goods.⁶ But the contract of the surety will be discharged by a failure of the lessor to give him reasonable notice of the default of the principal debtor. For upon general principles he is entitled to notice in order that he may take measures to indemnify himself against ultimate loss; and he will therefore be discharged, if he can show that he has sustained loss in consequence of the negligence of the party guaranteed to give him notice.⁷ Nor is the surety of a tenant liable, on his covenant to have the property returned in good order, for the failure of his principal to return the house and lot at the expiration of the term, when possession was not requested nor any readiness to receive possession expressed.⁸ [The covenant of the guarantor being personal and not running with the land, it is to be sued on not by the heirs but by the personal representative of the covenantee.⁹]

¹ *Burnham v. Hubbard*, 36 Conn. 539.

² *Shufeldt v. Gustin*, 2 E. D. Smith, 57.

³ *Ogden v. Roe*, 3 E. D. Smith, 812.

⁴ *Morgan v. Smith*, 14 N. Y. 244.

⁵ *Huffman v. Hulbert*, 13 Wend. 377; *Herrick v. Boest*, 4 Hill, 650; *Field v. Cutler*, 4 Lans. 195.

⁶ *Ruggles v. Holden*, 8 Wend. 216.

⁷ *Oxford Bank v. Haynes*, 8 Pick. 423; *Talbot v. Gay*, 18 Ill. 534; *Douglas v. Reynolds*, 1 Pet. 114; *Cannon v. Gibbs*, 9 S. & R. 202; and see *Union Bank v. Coster*, 8 N. Y. 203.

⁸ *Kyle v. Proctor*, 5 Bush, 498.

⁹ *Walsh v. Packard*, 165 Mass. 189. Although the guaranty in this

case did not in terms run to the heirs, executors administrators and assigns of the lessor, it was assumed, for the purposes of the case, that it continued to run after the death of the original covenantee. An undertaking to guarantee payment of rent by one jointly interested with the tenant in a business carried on on the leased premises made as a part of the general agreement of the parties for the rental of the premises is an original undertaking and so not within the Statute of Frauds, *Ward v. Hasbrouck*, 169 N. Y. 407.

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